5

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 458.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, AND OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, *APPELLANTS*,

VS.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES.

Appeal From the United States Commerce Court.

BRIEF FOR APPELLANTS.

John Lee Webster,
Solicitor for Appellants.

Frederic D. McKenney,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 846.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, AND OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, *APPELLANTS*,

VS.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES.

Appeal From the United States Commerce Court.

BRIEF FOR APPELLANTS.

THE STATEMENT OF THE CASE.

On or about the 8th of March, 1907, West End Improvement Club, an association of persons of Council Bluffs, Iowa, filed its petition with the Interstate Commerce Commission, complaining against Omaha & Council Bluffs Street Railway Company and Omaha & Council Bluffs Railway & Bridge Company as defendants thereto, averring that a charge of ten cents (10c) for a single fare between Council Bluffs in the State of Iowa, and the City of Omaha in the State of Nebraska, is unreasonable and unjust, and praying that the complainants herein be ordered and required "to make and fix maximum passenger fares to apply in future to the transportation

of passengers from Council Bluffs to Omaha, and the reverse, which shall not exceed five cents (5c) per passenger, or such charge as the Commission shall find reasonable and just."

The said appellants herein as Street Railway Companies, filed answers before the Interstate Commerce Commission pleading that the said ten cent (10c) fare was not excessive, but to the contrary was just and reasonable. Said answers further averred that said street railway companies were not railroad companies within the meaning of the Interstate Commerce Act, and were not subject to the jurisdiction of the Interstate Commerce Commission.

Afterwards and on the 27th day of November, 1909, the Interstate Commerce Commission issued its order which reads as follows:

> "*It is ordered,* That the defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of February, 1910, from charging, demanding, collecting, or receiving their present fare of 15 cents per passenger for the transportation of passengers from Council Bluffs, Iowa, not including Courtland Beach, Iowa, to points on defendants' lines in Omaha, Nebr., or from points on defendants' lines in Omaha, Nebr., to Council Bluffs, Iowa, not including Courtland Beach, Iowa.
>
> *It is further ordered,* That the said defendants be and they are hereby, notified and required to establish on or before the 1st day of February, 1910, and maintain in force thereafter during a period of not less than two years, a charge for the transportation of passengers from any point on defendants' lines in Council Bluffs, Iowa, not including Courtland Beach, Iowa, to any point on defendants' lines in Omaha, Neb., or from any point on defendants'

lines in Omaha, Neb., to any point on defendants' lines in Council Bluffs, Iowa, not including Courtland Beach, Iowa, which shall not exceed 10 cents per passenger."

These appellants herein filed their bill in the United States Circuit Court for the District of Nebraska, praying for an injunction to enjoin the enforcement of the said order on two grounds:

First. That the Interstate Commerce Commission was without jurisdiction to make the order for the reason that the provisions of the Interstate Commerce Act applied to commercial railroads and not to street railroads, and that the word "railroad" in the Interstate Commerce Act does not include and was not intended to include street railway companies.

Second. That the effect of the order is to require Omaha & Council Bluffs Street Railway company (a Nebraska company which owns and operates the street railway lines in Omaha) to receive and carry without compensation to any point within the corporate limits of the City of Omaha, all persons who may have paid a 10-cent fare to ride from Council Bluffs, Iowa, to Omaha, Nebraska, on the line of Omaha & Council Bluffs Railway & Bridge Company. (The Iowa Corporation).

Omaha & Council Bluffs Railway & Bridge Company is incorporated under the laws of Iowa, as a Street Railway Company, and owns the street railway lines in Council Bluffs, Iowa, and extending over a bridge across the Missouri River to the eastern limits of the City of Omaha, Nebraska. Omaha & Council Bluffs Street Railway Company is incorporated under the laws of Nebraska as a Street Railway, and owns and operates the street railway lines in Omaha and adjacent munici-

palities, South Omaha, Dundee, Benson and Florence, and likewise operates the Council Bluffs lines of Omaha & Council Bluffs Railway & Bridge Company under a long time lease.

The case was first heard on bill and demurrer in United States Circuit Court for the District of Nebraska, before Judges Sanborn, Hook and Adams, who handed down a written opinion and granted a temporary injunction holding that the Interstate Commerce Commission had no jurisdiction to make the order. Said opinion and order is reported in 179 Fed. 243, and a copy of said opinion and order is printed herewith in the appendix. (See rec. p. 30).

Before final decree the case was transferred to the United States Commerce Court by operation of law, which heard the case on bill and demurrer, and held that the Interstate Commerce Commission did have jurisdiction to make the order and dismissed appellants' bill. (rec. pp. 36 to 44.) To the order and judgment of the United States Commerce Court the appellants filed their assignment of errors and sued out their appeal to this court.

ASSIGNMENT OF ERRORS.

I.

The court erred in holding that the Interstate Commerce Commission, under the Act to Regulate Commerce, has jurisdiction over Street Railroads and Street Railroad Companies; and whereas the court should have found that the Act to Regulate Commerce does not include Street Railroads and does not confer authority upon the Interstate Commerce Commission to regulate fares or transportation upon Street Railroads.

II.

The court erred in holding that the Interstate Commerce Commission had jurisdiction to make its order under date of November 27, 1909, fixing and regulating certain rates of fare upon the plaintiff's street railway lines, between points in the City of Council Bluffs, Iowa, and into and upon the lines of Omaha & Council Bluffs Street Railway Company within the corporate limits of the City of Omaha.

Whereas the court should have held that the order of the Interstate Commerce Commission was void and beyond the scope of its authority in that it requires the Omaha & Council Bluffs Street Railway Company to carry upon its lines within the City of Omaha without compensation, persons who may have paid a fare of ten cents (10c) to ride from Council Bluffs, Iowa, to Omaha, Nebraska, upon the lines of the Omaha & Council Bluffs Railway & Bridge Company.

III.

The court erred in refusing to grant the injunction prayed for by the plaintiffs, and by its order and decree directing that the plaintiff's bill of complaint be dismissed. (See rec. pp. 45-46.)

BRIEF OF THE ARGUMENT.

I.

THE ACT TO REGULATE COMMERCE AND THE ACTS AMENDATORY THEREOF AND SUPPLEMENTAL THERETO, AT THE TIME SAID ORDER WAS MADE, DID NOT INCLUDE STREET RAILWAY COMPANIES. THE TERM "RAILROAD" IN SAID ACT APPLIES ONLY TO COMMERCIAL RAILROADS AS DISTINCT FROM STREET RAILWAY COMPANIES.

The provisions of the act to regulate commerce apply to "any common carrier or carriers engaged in the transportation of passengers or property wholly by *railroad*, or partly by *railroad* and partly by water when both are used under a common control." The question is, whether the word *"railroad"* includes a street railway. Section 1 of the act defines "railroads" as follows:

> "The term *'railroad'* as used in this act, shall include all bridges and ferries used or operated in connection with any *railroad*, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property."

The words, "common carrier" are defined in the first section of the act as follows:

> "That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by *railroad*, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning

and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by *railroad* (or partly by *railroad* and partly by water when both are used under a common control.")

Wherever else the words "common carrier" are used in the said act they are coupled with the phrase limiting them to the carriers "*subject to the provisions of this act.*" There is thus a manifest intention to limit the word "carrier" or "common carrier" to the kinds of carriers elsewhere *defined and made subject to the provisions of the said act.* We revert back all the while to the point whether the word "*railroad,*" as mentioned and defined in the act, includes or does not include a street railway.

To have the term "common carrier" applied to street railroads, or the word "railroad" as used in said act extended by implication to include street railways, would lead to many conflicting embarrassments in the construction of the act and to *impossible conditions* in the operation and enforcement of the act. This may be illustrated by reading one subdivision of Section 1 of the act as amended 1906 with the words "street railroad" substituted for the words "common carrier."

"Any common carrier (street railway) subject to the provisions of this act, upon application of any lateral, branch line of railroad, (street railway) or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad (street railway) or private side track which may be constructed to connect with its railroad (street railway), where such connection is reasonably practicable and can be put in with safety and will furnish sufficient

> business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper."

It will be seen from the quotation supra that if the words "common carrier" or "railroad" as used in the act includes street railway companies, that street railway companies may be *required to make connections with commercial railroads,* and that *shippers of stock* or merchandise would have the right to compel *street railway* companies to *transport stock* or merchandise upon the lines of track of a street railway company along and through the streets of the city to point of destination. Other like impossible conditions and incongruities will occur to the court in its consideration of said section.

Section 2 of the act applies to special rates, *rebates,* drawbacks, etc., or the granting of a rate less than it receives from any other person for transportation of a like kind of traffic under substantially similar circumstances, etc. Certainly such condition was not intended to apply to *street railway* companies, and can have no relation to the business as conducted by street railway companies.

To substitute "street railway" for "common carrier" in Section 6 is to make it manifest said section was not intended to include street railways. Section 6 of the act provides that every "common carrier" (street railway) shall afford "equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to *and* from their several lines. Said section had reference to commercial railroads only. (The words

"street railway" are inserted in following quotation for illustration):

> "That every common carrier (street railway) subject to the provisions of this act shall file with the commission created by this act, and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad (street railway), by pipe line, or by water when a through route and joint rate has been established. If no joint rate has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation."
>
> "The schedules printed as aforesaid by any such common carrier (street railway) shall plainly state the places between which property and passengers will be carried, and shall contain the *classification of freight in force,* and shall also state separately *all* terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges of facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee."

It is apparent from the quotation *supra* from Section 6 that the provisions thereof are *impossible* as applied to *street railway* companies. Section 7 applies to carriers subject to the act, yet it only deals with the handling of freight, which is not carried by street railways. We may add that an examination of each and singular of the sections of the said act to regulate com-

merce will disclose that they were enacted to apply to commercial railroads, and that most of the provisions are *impossible* if attempted to be applied to *street railways.*

Interurban Railroads. It is not necessary to our criticisms to suggest that there are interurban railroads operated by electric power which only carry passengers. The fact remains that such *interurban railroads* are usually constructed by corporations created under the *general railroad law of their respective states, and are possessed of the corporate power of commercial railroads, including the power of eminent domain and the right to transport freight.* Such interurban railroads are operated through the country as are commercial railroads, and are not limited to the right of constructing roads upon the streets of a city, coupled with a condition precedent of a majority vote of the electors as are the appellants.

We may say by way of illustration that interurban railroads in the State of Nebraska are incorporated under the general railroad laws of the state, and have power to transport freight and the right of eminent domain, and subject to all other conditions and limitations and possessed of all rights and privileges that belong or attach to commercial railroads, and are distinct from street railway corporations.

Senator Cullom, chairman of the Senate Committee, said when the act was under consideration:

> "*The bill is not intended to affect* the stage coach, *the street railway,* the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be en-

gaged in interstate commerce, as it would do if it was made to apply to all common carriers engaged in interstate commerce, *because it is not deemed necessary or practicable to cover such a multitude of subjects.*" Congressional Record, Vol. 17, Part IV, p. 3472.

Wilson v. Rock Creek Railway Co. of the District of Columbia, 7 I. C. C. R. 83, is a case where the Interstate Commerce Commission held that it had jurisdiction over the Rock Creek Railway Co., but the case is not decisive of the question in the case at bar. The Rock Creek Railway Company was *not* a street railroad in the sense that the complainant companies are street railroad corporations. The Rock Creek Railway Company was created by an act of Congress. Its operation was not confined to a street railway line upon the streets of a city. It was in the nature of an interurban railroad company. It would appear from the opinion of the Commission that it also had the corporate power to transport freight. Be that as it may, in said case Prouty, Commissioner, delivered a dissenting opinion which was concurred by Yeoman, Commissioner. Prouty in his dissent said:

"The term 'railroad' is undoubtedly broad enough to include a street railway, and often does include it in statutory enactments. There is, however, a *wide distinction* between a *railroad* in the ordinary acceptation of that term and a *street railroad*, and whether the term 'railroad,' when used in a particular statute, does or does not include a street railway, is a question of legislative intent in each particular case. Looking to the scope and substance of the Act to Regulate Commerce, *I do not think that Congress intended to include street railways.*"

In the opinion of the Commission in the instant case, *Prouty, Commissioner,* said, (Rec. p. 29):

> "In *Wilson v. Rock Creek Ry. Co.*, 7 I. C. C. Rep., 83, I expressed the opinion that the act to regulate commerce did not apply to ordinary street railways. I still entertain the same opinion." * * * "Knapp, Chairman, and Cockrell, Commissioner, instruct me to say that they also doubt upon the point of jurisdiction."

Said three Commissioners concurred in the order of the Commission by reason of the fact that the Rock Creek case had been acquiesced in for a period of 12 years.

SANBORN, HOOK AND ADAMS, United States Circuit Judges, were also of the opinion, as appears by their order, rec. pp. 30-31, that "*Congress never intended that the act to regulate commerce*" * * * "should apply to, and they are of the opinion that they do *not apply to, such street railway companies,* that no power has been delegated thereby to the Interstate Commerce Commission to regulate or affect the rates of transportation of such companies and that the order of the Interstate Commerce Commission was *beyond its powers.*"

II.

IT SEEMS TO BE WELL SETTLED BY ADJUDICATION THAT THE WORD "RAILROAD" AS USED IN THE CONSTITUTIONS AND STATUTES OF THE VARIOUS STATES DOES NOT INCLUDE STREET RAILWAY COMPANIES, AND THAT STREET RAILWAY CORPORATIONS ARE NOT GOVERNED BY LAWS RELATING TO RAILROADS. THIS DISTINCTION BETWEEN THE TWO KINDS OF RAILROADS WAS WELL KNOWN AT THE TIME OF THE PASSAGE OF THE ACT TO REGULATE COMMERCE.

The following list of cases in their various applications sustain the proposition that the word "*railroad*" as used in the constitutions and statutes of the several states does not include a street railway. Also that street railways are not included in fellow servant acts, in railway commission acts, in judgment lien acts, and other laws enacted to govern and control railroads, unless street railroads are specifically mentioned therein.

Cedar Rapids & Marion Street Ry. Co. v. City of Cedar Rapids, 106 Ia., 467.

Funk v. St. Paul Ry. Co., 61 Minn., 435.

Lincoln Traction Co. v. Webb, 73 Neb., 136.

Daily v. Milwaukee & E. R. L. Co., 119 Wis., 398.

Lincoln Street R. R. Co. v. McClellan, 54 Neb., 672.

Omaha Street R. Co. v. Boesen, 74 Neb., 765.

Railroad Company v. Railroad Commissioner, 73, Kan., 168.

State v. Cain, 69 Kan., 186.

Manhattan Trust Co. v. Sioux City Cable Ry. Co., 68 Fed., 82.

Bridge Co. et al. v. Iron Co., 59 Ohio St., 179.

Front Street Cable Ry. Co. v. Johnson, 2 Wash., 112.

Louisville & Portland Ry. Co. v. Louisville City Ry. Co., 2 Duvall (Ky.), 175.

In re New York District Ry. Co., 107 N. Y., 42.

Railroad Commissioners v. Market Street R. R. Co., 132 Cal., 677.

Thompson-Houston Etc. Co. v. Simon, 20 Ore., 60.

Sams v. St. Louis etc. Ry. Co., 174 Mo., 53.

State v. Duluth Gas & Water Co., 76 Minn., 96; (78 N. W., 1032-1034).

Gyger v. West Phila. Ry. Co., 136 Pa. St., 16.

Riley v. Galveston City R. R. Co., 35 S. W., 826.

State ex rel. vs. Lincoln Traction Co., Neb., Jan. 3, 1912. (See Appendix.)

Sears vs. Railway Co., 65 Iowa, 742.

Freiday vs. Sioux City Rapid Transit Co., 92 Iowa, 191.

Railroad Commissioners v. Market Street R. R. Co., 65 Pac., 1065 132 Cal., 677, is a case in which it was held that street railway companies were not included within the constitutional provision of the State of California providing for a railway commission. The constitutional provision, Sec. 22 of Art. 12, is quoted in the opinion of the court (p. 678) as follows:

> "The state shall be divided into three districts, as nearly equal in population as practicable, in each of which one railroad commissioner shall be elected. * * * Said Commissioners shall have the power, and it shall be their duty, to establish rates of charges for the transportation

of passengers and freight by *railroad and other transportation companies.*"

The court in commenting upon the constitutional provision, among other things, said (p. 678):

> "Do the words, '*railroad and other transportation companies,*' include a street railway company in a municipality, engaged in the business of carrying passengers on street railroad cars? In order to correctly determine this question, we must look to the words used, the context, the object in view, and the evils that were intended to be remedied. In this manner we should, if possible, arrive at the intention of the convention in using the words, and give to them the same meaning and effect as was intended by the people, through their representatives, in framing the constitution. * * * The constitution in no place mentions street railroad corporations, although there were many such corporations in existence at the time it was framed."

The court in commenting upon the provisions of the constitution made some comments that are quite pertinent when applied to the act to regulate commerce, saying (p. 679):

> "In the section of the constitution quoted, the power is given to establish rates for *passengers and freight.* And it is further provided that the 'rates of fares and freight' established by the said commission shall be conclusively deemed just and reasonable. It is further provided, in Section 23 of the same article, that the state shall be divided into three 'railroad districts,' naming the counties in each district. This is consistent with the idea that the entire people of the state were interested in the great corporations engaged in the carrying of freight and passengers from one portion of the state to an-

other, or from sister states into or through the state. It is inconsistent with the idea that the entire people of the state were interested in the rates for carrying passengers within the corporate limits of a town or municipality."

Gyger v. West Philadelphia Ry. Co., 136 Pa. St., 96, is a case in which it was ruled that Sec. 4 of Art. 17 of the Constitution of Pennsylvania, which provides that

> *"no railroad, canal, or other corporation * * * shall consolidate * * * with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning * * * a parallel or competing line,"*

is not applicable to street railway companies.

In the opinion the Court said:

> "It is perfectly clear that the convention did not regard the word 'railroad' as synonymous with 'railway' or 'street passenger railway,' when this section of the article was framed."

Funk v. St. Paul Ry. Co., 61 Minn., 435 (52 Am. St. Rep., 608,) is a case in which it was ruled that the fellow servant act of the State of Minnesota did not apply to street railway companies. The statute reads (Gen. Statutes 1894, Sec. 2701):

> "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof without contributory negligence on his part, when sustained within this state."

The Court in its opinion said:

> "The common understanding of a *railroad* is that it is a graded road or way on which rails of iron

> or steel are laid for the wheels of cars to run upon, carrying heavy loads, usually propelled by steam."
>
> "A *street railway* is dedicated to a more limited use of the local public, for the more transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street railway is *not* a railroad. * * * A 'railroad' and a 'street railroad,' or way, are, in both their technical and popular import, *as distinct* and *different* things as a road and a street, or as a bridge and a railroad bridge; and it has been authoritatively adjudged that the simple term 'bridge' means a viaduct in a road dedicated to common use, and that the qualified phrase 'railroad bridge' means a viaduct constructed for the exclusive use of railroad transportation."

We called attention *supra,* to the point that if the complainant street railway companies were required to carry merchandise, or freight, or cars of railroad companies over their tracks in the streets of the cities, as they would be required to do if the act to regulate commerce was enforced against them according to its terms, that the same would be in *violation of the charters* of the companies. It was said in *Daly v. Milwaukee Electric Railway & Light Co.,* 119 Wis., 398:

> "To the extent that the defendant exceeded its authority by running freight cars over its tracks without legislative permission, express or implied, it must be regarded as acting in violation of law, and hence answerable accordingly."

The State of Kansas v. Grant Cain, 69 Kan., 186, is a case in which it was ruled that a statute of the State of Kansas, which made it a criminal offense to injure or destroy a locomotive, car, or other machinery in use

upon "any railroad" did not apply to or include a street railway. In the opinion the court said (p. 189):

> "The authorities generally hold that street railways are not included in the word 'railroads,' and the provisions of the statute of the different states concerning railroads have not been held to include street railways."

The court in its opinion to sustain the above cites and quotes from the following cases:

> *Funk v. Paul City Ry. Co.*, 61 Minn., 435.
>
> *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 68 Fed., 82.
>
> *Louisville etc. R. R. Co. v. Louisville City Ry. Co.*, 63 Ky., 175.
>
> *Lincoln Street R. Co. v. McClellan*, 54 Neb., 672.
>
> *Bridge Co., et al., v. Iron Co.*, 59 Ohio St., 179.

Railroad Co. v. Railroad Commissioners, 73 Kan., 168, is a case in which it was ruled that the railroad commissioners of the state of Kansas did not have supervision over street railways. The section of the statute construed, reads as follows (p. 169):

> "Any *railroad* company authorized to operate a *railroad* in this state desiring to cross or unite its track with any other *railroad* upon the grounds of such other railway corporation shall make application in writing to the board of railroad commissioners, stating the place of crossing or intersection," etc.

The court in concluding its opinion said (p. 173):

> "We conclude that the railroad commissioners have no general jurisdiction over a company engaged in the operation of an electric railway; that such a company is not included within the term 'rail-

> road company' as ordinarily employed in the statute referred to; and that the language of the section relating to the crossing of railroad tracks does not manifest an intention to give that part of the law any wider application in this respect."

Sams vs. St. Louis, etc. Ry. Co., 174 Mo., 53, in a case in which it was ruled that the fellow servant act of 1897 did not apply to street railway companies. The language of the first section of the fellow servant act of 1897 of the State of Missouri reads as follows (p. 64):

> "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof."

The question presented in the case was, whether the word "railroad" as used in said section included a street railway. The court in its opinion said (p. 69):

> "It is conceded that the term 'railroad' when used in a statute does not always include in its meaning a street railroad. The learned counsel for appellant in their brief say: 'For some purpose the law recognizes several species of railroads and railroad companies, and recognizes a distinction between a 'railroad' and a 'street railroad.' Statutes using the general term 'railroad' may or may not apply to a 'street railroad.' That is undoubtedly the law, and, therefore, when the word 'railroad' is used in a statute, if we want to know if it is intended to embrace in its meaning a street railroad, we must look at the connection in which it is used.'"

The court then cites with approval the rulings of the courts of other states in the following cases, holding that "railroad" does not include street railway: *Funk v.*

St. Paul City Ry. Co., 61 Minn., 435; *Williams v. City Electric St. Ry. Co.*, 41 Fed., 556; *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 68 Fed., 82; *Thompson-Houston, etc., Co. v. Simon*, 20 Ore., 60.

The Court in speaking of the cases said (p. 75):

> "The general doctrine runs through them all that the term *'railroad' does not include 'street railroad'* unless so expressed or necessarily understood from the context; that as a rule, the term means ordinary commercial railroads only, and it is the exception when it means street railroads."

Louisville etc. Ry. Co. v. Louisville City Ry. Co., 63 Ky., 175, is a case in which the court said:

> "A rail*road* is for the use of the universal public in the transportation of all persons, baggage and other freight,—a street rail*way* is dedicated to the more limited use of the local public for the more transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street rail*way* is not a rail*road*. And we presume that in this contradistinctive sense, the term 'rail*road*' was used in the appellant's charter as amended in 1860. A *'railroad'* and a *'street* railroad' or way, are, in both their technical and popular import, as distinct and different things as *'a road'* and a *'a street,'* or as *'a bridge'* and *'a railroad* bridge,' and it has been authoritatively adjudged that the simple term 'bridge' means a viaduct in a road dedicated to common use, and that the qualified phrase, a *'railroad* bridge' means a viaduct constructed for the exclusive use of railroad transportation."

Front Street Cable Ry. Co. v. Johnson, 2 Wash., 112, is a case that involved the question whether a street railroad was included within the word "railroad," in

the lien law of the State of Washington. The court held that a *"street railroad" was not a "railroad"* within the meaning of said act, and among other things said:

> "We deem it to be a clear proposition, also that these 'railways' are not 'railroads;' according to the usual and ordinary meaning of the word, to which reference must be had for the interpretation of a statute."

Thompson-Houston Co. v. Simon, 20 Ore., 60, is a case which involved the question whether the words "any railway" in the statute relating to *eminent domain* conferred that power upon a street railway company, and the court held it did not. The court said:

> "It is plain that the provisions of such a law can have little or no reference to corporations organized and operated as street railways propelled by electricity or horse power and intended to accommodate local convenience for the transportation of passengers. They contemplate a track laid upon an established street or highway, and are usually restricted to the bounds of the city, its vicinity, or adjacent towns, and generally derive their authority to lay their tracks upon such streets or highways from the municipality or county, and their construction is regarded by many adjudications as a legitimate use of such streets and highways, and an exercise of the right of public travel."

Riley v. Galveston City R. R. Co., 35 S. W., 826, is a case in which it was ruled that a fellow servants act which used the phrase "any railway corporation" did not include street railway companies. The court in its opinion said (pp. 826-7):

> "These considerations are persuasive, if not conclusive, that the intention of the legislature in passing the fellow servants act was not to in-

clude street railways within its provisions, and that the words 'any railway corporation' in the first section of the act, *should be restricted* to the usual and popular import of that term, and that the act should be held not to embrace railways constructed and maintained upon streets and other highways in and contiguous to cities and towns for carrying persons. The supreme court of Kentucky, in the case of *Louisville & P. R. Co. v. Louisville City Ry. Co.*, held that a 'railroad' or 'railway,' and a 'street railroad' or 'street railway,' are, in both their technical and popular import, as distinct and different things as a 'road' and a 'street,' or as a 'bridge' and a 'railroad bridge.'" * * * "A further distinction between a 'railway corporation' or 'railroad corporation' and a 'street railway corporation' is this: That the former owns, not only its track and roadbed, but its right to their use and occupation is exclusive, while the latter owns no roadbed, nor is its occupancy of that portion of the street on which its track is laid exclusive, but it is only a license of the city, with privilege to use the street in common with the public. Our conclusion, therefore, is that the act known as the 'Fellow Servants Act,' and entitled 'An Act to define who are fellow servants, and who are not fellow servants,' etc., and approved May 4, 1893, does not apply to street railways."

Manhattan Trust Co. v. Sioux City Cable Ry. Co., 68 Fed., 82, is a case in which *Judge Shires* held that the *Iowa Statute* making a judgment against any railway corporation, for injury to person or property, a lien superior to that of mortgages on its property, *does not apply to street railway* corporations. The court in the course of its opinion said (p. 84):

"It cannot be denied that there is, in fact, a *distinction* between the two kinds of railways, and an examination of the statutes of the state shows

that such a distinction is recognized in the legislation of the state, and that in general the term 'railroad or railway' is used to designate the former class, and the words 'street railway or railroad' the latter. From this it follows that, unless the context or subject-matter of a particular statute shows the contrary, the *presumption* is that the legislature did not intend to include street railways in the general term 'railroad or railway.' "

State v. Duluth Water Co., 76 Minn., 96, is a case in which it was held that the *gross-earnings tax law* of Minnesota did not apply to *street railways* on the theory that a street railroad company is not a railroad company. The court in its opinion said (p. 106):

"Assuming, without deciding, the validity of this act, it applies only to what are usually known as ordinary commercial railways, *and not to street railways.* This is the practical construction which has always been placed on this statute by both the state and the street-railway companies. The correctness of this construction was assumed without question by this court in *State v. District Court of 11th Jud. Dist.*, 54 Minn., 34; 55 N. W., 816. All through our statutes the legislature has uniformly, so far as we have discovered, used the word 'railroad' or 'railway,' when unqualified, as referring exclusively to ordinary commercial railroads, while, on the other hand, when they have intended to refer to street railroads they have qualified the word 'railroad' by the prefix 'street.' " * * *

"While the defendant may possess some unexercised powers not ordinarily conferred upon street-railway companies, yet it is perfectly apparent that it is in all essential respects a 'street,' and not a 'commercial,' railroad. Therefore the gross-earnings tax law of 1887 does not apply."

Lincoln Street Ry. Co. v. McClellan, 54 Neb., 673,

is a case in which it was held that Sec. 3, Art. 1, Ch. 72, which provides *"every railroad company"* shall be liable for damages inflicted upon passengers except in cases where the injury arises from the criminal negligence of the person injured, *does not apply to street railway companies.* The court among other things said (pp. 675-676):

> "There is nothing whatever in the title or body of the act which indicates a legislative intent to make its provisions, or any of them, applicable to street railways." * * * "In the common understanding, *a railroad* and a *street railway have always been separate and distinct things.* One is a graded road over which heavy cars, running on iron or steel tracks and usually propelled by steam, carry passengers, *freight,* and *baggage,* while the other is *exclusively employed for the transportation of passengers in cities* and is so constructed as to interfere but little with *ordinary traffic.*"

In *Omaha Street Railway Co. v. Boesen,* 74 Neb., 764, the same point was ruled where the court said (p. 766):

> "Section 3, Article 1, Chapter 72, Compiled Statutes 1903 (Ann. St. 10039), which charges railroad companies with liability for all damages inflicted upon the person of their passengers while being transported over their roads, except when the injury arises from the criminal negligence of the person injured, has no application to street railways. *Lincoln Street R. Co. v. McClellan,* 54 Neb., 672."

In *Lincoln Traction Co. v. Webb,* 73 Neb., 136, it was again said that street railway companies are not governed by Ch. 72 of Comp. Statutes "which defines the liability of steam railways in this state for damages inflicted upon passengers."

Massachusetts Loan & Trust Co. v. Hamilton, 88 Fed. 588, is a case where the Circuit Court of Appeals for the Ninth Circuit held that a statute of Montana which provided that a "judgment against *any railway corporation* * * * shall be a lien, etc." Said court held that the words "any railway corporation" as used in the statute did not apply to and did not include street railways. The court after an analysis of a large number of cases concludes, p. 598:

> "Having arrived at the conclusion that the statute in question is not applicable to street railroads, and this being conclusive of the case, it is unnecessary to notice any of the other objections presented by appellant. The decree of the Circuit Court is reversed and the cause remanded, with instructions to dismiss the bill."

III.

UNDER THE CONSTITUTION AND LAWS OF NEBRASKA, OMAHA AND COUNCIL BLUFFS STREET RAILWAY IS A STREET RAILWAY AND IS NOT A STREET RAILROAD.

A copy of the sections of the Constitution and Statute Laws of Nebraska, relating to railroads and to street railways, are printed in an appendix to this brief.

Sections 3 and 4 of Article 11 of the Constitution of 1875 apply to *railroads* engaged in the *"transportation of passengers and freight."*

Section 2 of Article 11-b. of the Constitution prohibits the construction of a street railway within a city without the consent of a majority of the electors.

Railroads are incorporated under Sections 72, 73, 74, 75 of Chapter 16, under the sub-head "**railroad companies**," of Compiled Statutes of Nebraska, 1911, pp. 596,

597. Street railway companies are incorporated under the sub-division relating to miscellaneous corporations. See Section 1, Article 7, Chapter 22, Compiled Statutes of Nebraska, 1911, p. 1475. By Section 3 of Article 7, street railway corporations are required to "name the streets through which said railway is to be constructed." And the proposition to be submitted to the electors of said city shall "name the streets through which said railway is to be constructed." Section 12 of Article 7 defines a street railway as embracing "all street railroads built and operated for the convenience of passengers along the streets of cities."

By Section 3 of Article 11 of the Constitution *railroad* corporations are prohibited from consolidating their stock, property or franchises. By Section 6 of Article 7, Chapter 72, Compiled Statutes 1911, p. 1477, street railways having connecting or continuous lines are "authorized to consolidate." Railroads possess the power of eminent domain. Street railways do not. Certificate of incorporation of a railroad is filed with the *Secretary of State*. Articles of incorporation of a street railroad are filed with the *County Clerk* of the county in which incorporated.

It will thus be seen there is a well defined and marked *distinction* between *railroad* corporations and *street railway* corporations under the constitution and laws of the State of Nebraska.

This distinction was recognized in *Lincoln Street Railway v. McClellan*, 54 Neb., 672, which held that Section 3 of Article 1, Chapter 12, relating to railroad companies, did not apply to street railway companies. And likewise, again in *Omaha Street Railway Company v.*

Boesen, 74 Neb., 764, and in *Lincoln Traction Co. v. Webb,* 73 Neb., 136, cited and quoted from *supra.*

In a late case, *State ex rel Tyrrell v. Lincoln Traction Co.,* opinion filed January 3, 1912, and not yet published, the court held that Sections 3 and 5 of Article 11 of the Constitution applied to *railroads,* but did not apply to *street railroads.* The syllabus of the opinion prepared by the court upon this point is as follows:

> "2. Section 3, Article XI of the Constitution, which prohibits the consolidation of the stock, property, franchises or earnings in whole or in part of railroad corporations and telegraph companies owning parallel or competing lines, does not apply to street railway corporations not engaged in general railroad or telegraph business."
>
> "3. Section 5, Article XI of the Constitution, which forbids a railroad corporation issuing any stocks or bonds except for money, labor or property actually received and applied to the purposes for which such corporation was created, does not apply to street railway corporations not engaged in general railroad business."

The above case arose out of a consolidation of the stock and franchises of the Lincoln Traction Co., and the Citizen Street Railway Co., both being street railways in the City of Lincoln. The suit was one by the state to set aside the consolidation and for a cancellation of the stock and bonds of the consolidated company. The court in its opinion held that the provision of the State Constitution which prohibited the consolidation of railroads did not apply to or include street railroads. For full text of the opinion on this point see appendix to this brief.

The conclusion is self evident that Omaha & Council Bluffs Street Railway Company, a Nebraska Corpo-

ration under the Constitution and Laws of Nebraska, is a street railway, as distinct from a railroad company, and that the two classes of corporations are governed by different constitutional provisions and by different statutes, and that their corporate powers are distinct.

IV.

OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY IS INCORPORATED AS A STREET RAILWAY COMPANY UNDER THE LAWS OF THE STATE OF IOWA, AND THE LAWS OF WHICH STATE ALSO RECOGNIZE THE WELL DEFINED DISTINCTION BETWEEN STREET RAILWAYS AND RAILROADS.

Sears vs. Railway Company, 65 Iowa, 742, is a case in which it was held that the two classes of corporations were distinct and that a statute requiring railroads to pay damages to abutting lot and land owners did not apply to street railroads, and said, p. 744:

> "In the grant of power, both 'railways' and 'street railways' are mentioned. There is, then, a statutory implication that they are not the same, but that there is a material difference between the two; and that a grant of the power to authorize one would not necessarily include the other. The limitation or qualification of such power, it will be observed, is thus expressed in the statute: 'But no railway track can thus be located and laid down' until the damages to the abutting owners is ascertained and compensated. As thus used in the statute, does 'railway track' mean or include 'street railway track,' operated by horse-power? We think not."

In *Freiday vs. The Sioux City Rapid Transit Co.*, 9 Iowa, 191, it was ruled that "an elevated steam rail-

road, although operated within the limits of a city was not a street railway." The court in its opinion noted the distinction between *an elevated* railroad operated by *steam* and a street surface railroad, and on this point said, p. 195:

> "Indeed, under the circumstances, it must be presumed that the words 'street railway,' as used in the statute, originally referred to the then known and used railways, the rails of which were laid to conform to the grade of the surface of the street, and the construction of which did not of necessity exclude the public from the use of a part of the street. While, as we have indicated, the object attained by an elevated railway like defendant's is the same as in case of a street railway laid upon the surface of the street, viz., the transportation of people from one place to another within the municipality, in every other respect, the elevated road is distinguishable from a surface railway. The defendant company's road is elevated above the street."

Cedar Rapids & Marion City R. Co. vs. City of Cedar Rapids, 106 Iowa, 476, is a case in which it was ruled that a company incorporated as a *street railway* to operate a line in the City of Cedar Rapids was a *street railway* notwithstanding the fact that it operated its line along a *highway to a neighboring town* by "over-head trolley." In the course of the opinion the court said, pp. 480-481:

> "The fact that plaintiff's street railway was authorized to be extended and laid and operated along a highway, precludes the conclusion that it was intended to be other than a street railway. Street railways constructed and operated as they are in streets and highways do not exclude other travel therefrom; but not so as to other railways constructed and

operated along a street or highway. Plaintiff's railway is identical in its construction and operation with other street railways, except in that it carries freight and express, to a limited extent, as well as passengers, while most others carry passengers only. It is unlike other than street railways in almost every other particular. It is insisted that this alone distinguishes it from street railways, and authorities are cited wherein it is said that a 'distinctive and essential feature of a street railway in relation to other railroads is that it is exclusive for the transportation of passengers, and not for goods.' Ordinarily that is true, but in this case we have a street railway corporation organized to operate a street railway in the City of Cedar Rapids, extending its railway beyond the limits of said city, under authority of said chapter 32, Acts Eighteen General Assembly, expressly relating to street railway companies. *Surely the mere fact that plaintiff carries goods and express matter does not take it out of the class of railways where this statute puts it.* It is not a 'railway corporation,' as contemplated in said section 1317, but a street railway, and is therefore subject to assessment by the local assessors."

In *Manhattan Trust Co. vs. Sioux City Cable Ry. Co.*, 68 Fed. 82, *Judge Shiras,* held, that the mechanic's lien law of the State of Iowa, which applied to *railroad companies* did not apply to *street railway* companies. (See excerpts from the opinion *supra.)*

We thus see that Omaha & Council Bluffs Railway & Bridge Company, which was incorporated as a street railroad under the laws of Iowa, and owns the street railway lines in the City of Council Bluffs, is a street railway as distinct from a railroad under the Constitution and Laws of the State of Iowa.

V.

THE DUAL FUNCTIONS OF A COMMERCIAL RAILROAD AND A STREET RAILWAY CANNOT BE COMBINED IN THE SAME CORPORATION.

Gillette vs. Aurora Ry. Co., 228 Ill., 261, is a case where the railway company was organized under the general railroad act of the State of Illinois as a commercial railroad. Its general purpose was to carry passengers, baggage and express. The court in that case said:

> "It is quite clear that the legislature never intended that a commercial railroad corporation should be formed for the mere purpose of constructing and operating street railways."
>
> "In *Chicago & Southern Traction Co. vs. Flaherty*, 222 Ill., 67, it was considered scarcely a doubtful question whether the same corporation could be both a street railway corporation and a commercial railroad corporation, *and we think it perfectly clear that it cannot.*"

Bradley Mfg. Co. vs. Traction Co., 229 Ill., 170, is a case in which it was said (pp. 175-6):

> " 'That any number of persons, not less than five, may become an incorporated company for the purpose of constructing and operating any railroad in the state.' (Hurd's Stat. 1905, p. 1564.) While the language above quoted is broad, it has been held (*Chicago & Southern Traction Co. vs. Flaherty*, 222 Ill., 67, and *Gillette vs. Aurora Railways Co.*, 228 id., 261), *that the same corporation cannot be both a street railway corporation and a commercial railroad corporation.*"

The presumption is that "railroad" does not include "street railway." There are no words in the Act to Regulate Commerce which either specifically or by implication include street railroads. To the contrary

there are many provisions of the Act to Regulate Commerce which are impracticable and impossible if attempted to be applied to street railroads.

VI.

THE ACT TO REGULATE COMMERCE HAS BEEN UNDER DISCUSSION, AND VARIOUS AMENDMENTS HAVE BEEN MADE THERETO SINCE ITS FIRST ENACTMENT IN 1887. IF CONGRESS INTENDED TO EXTEND SAID ACT TO INCLUDE STREET RAILWAYS WHY HAS NOT SUCH AMENDMENT BEEN MADE WHEN OTHER AMENDMENTS WERE BEING MADE TO THE ACT?

From the cases cited *supra,* it is manifest that the members of Congress (many of whom are lawyers) were familiar with the settled rule of construction by which the word "railroad" as found in the constitution and statutes of the states did not include a "street railway." They were further advised that there did not exist any general public demand that street railways should become subject to congressional legislation, or the control of an Interstate Commerce Commission.

The said act to regulate commerce has been amended so as to include certain specified companies other than commercial railroads, to-wit: "express companies," "sleeping car companies," "pipe lines," etc. We are not aware that it was proposed by anybody to insert into the law the words "street railways," or "street railway companies."

In deciding whether the act to regulate commerce applies to street railways it is proper to consider the inconveniences that would result to the public by compelling interchange of freight and cars and passengers between commercial railroads and street railway com-

panies, as well as the fact stated supra that there exists no necessity, nor public demand for the regulation of street railway companies by the Interstate Commerce Commission.

This subject matter is well illustrated in the following cases:

Michigan Ry. Co., et al. vs. Hammond, etc., Electric Ry. Co., 83 N. E., 650, is a case in which it is ruled that a statute of Indiana, which reads as follows, does not apply to street railways:

> "Sec. 4. 'In case, however, one railroad company or an electric railroad company shall hereafter cross at grade with its track or tracks, the track or tracks of another railroad, the railroad company or the electric railroad company seeking to cross at grade shall be compelled to interlock such crossing to the satisfaction of the said Auditor, and to pay all cost of such appliance, together with the expense of putting them in and the future maintenance and operation thereof,' " etc.

The court in giving its reasons why the above quoted statute does not apply to street railway companies among other things said (p. 653):

> "We know as a matter of public history that at the time of the passage of the act of 1897 this right of crossing on highways had been exercised in a great many cities in the state where electric street railways and steam railroads were both maintained. We also know that interlocking systems consist in part of appliances that occupy space and would be obstructions, if constructed in the streets and highways, that would seriously interfere with the rights of the public therein. * * * It had for its primary object the relief of the intersecting railroads from a burden which the safety of the public made neces-

> sary, a relief that could only be obtained by substituting a protection that was considered equally as good. This is evident from the first three sections of the act. Under it intersecting railroads already constructed had the choice of alternatives, they could either continue to stop their trains, as required by law, or they could put in the protecting devices, as stipulated, the ultimate purpose in either event being the protection of the traveling public. *We cannot attribute to the Legislature* the intention to compel the erection of obstructions, such as interlocking systems, in the public streets and highways by street railroads, which, in theory at least, are not obstructions to the free use thereof, for the primary benefit of the railroads crossing the same, it being the policy of the law to keep the public thoroughfares as free from obstructions as the growing demands of the public will permit."

Massillon Bridge Co. vs. Cambria Iron Co., 59 Ohio St., 179 (52 N. E., 192) is a case in which it was held that a mechanics' lien law did not apply to street railway companies. The section of the statute under consideration contained the following language:

> "'A person who performs labor or furnishes material for or in construction of any *railroad*, depot buildings, water-tanks, or any part thereof, and a person who furnishes boarding on the order of any contractor or sub-contractor, to persons employed by them or either of them, in furnishing materials, or performing labor for or in construction of such railroad,'" etc.

The court in ruling that the word *railroad* as used in said mechanics' lien law quoted *supra* did not apply to a street railroad, used the following language par-

ticularly pertinent to the construction to be put upon the Act to Regulate Commerce. The court said:

> "The statute speaks of *railroads, depot buildings, water tanks, and railroad companies,* all of which are peculiarly applicable to steam railroads; and it is *silent as to street railroads, barns, power houses, poles, wires, dynamos, machinery, and car barns,* and in fact silent as to everything that is peculiarly applicable to street railroads. If street railroads were intended to be included, the statute, in some of its enactments, *revisions,* and *amendments,* would have used some word peculiarly applicable to street railroads." * * * "From a careful examination of the course of legislation on the subject of railroads and street railroads, it appears that the legislation as to each has been carefully kept separate, and the statutes as to railroads do not apply to street railroads unless made to do so by clear reference."

The two cases quoted from *supra* are important in the consideration of two points in discussion: (1) the impracticability in the application of the Act to Regulate Commerce to street railway companies; (2) the fact that while numerous amendments have been made to the Act to Regulate Commerce, no words have been used to indicate that *street railroads* are to be included, nor words or phrases that would have any special application to street railroads.

VII.

THE ORDER OF THE COMMISSION IS VOID BECAUSE IT WAS BEYOND THE SCOPE OF THE COMPLAINT, AND FOR THE FURTHER REASON THAT THE EFFECT OF THE ORDER IS TO REQUIRE OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY TO RECEIVE AND CARRY IN ITS CARS TO ALL POINTS WITHIN THE CITY OF OMAHA, AND WITHOUT COMPENSATION, PERSONS WHO HAVE PAID A FARE OF TEN CENTS TO RIDE ON THE BRIDGE LINE FROM COUNCIL BLUFFS, IOWA, TO THE EASTERN BOUNDARY OF THE CITY OF OMAHA, AND IS THEREFORE A DIRECT INTERFERENCE WITH WHAT IS INTRASTATE BUSINESS.

The complaint of the West End Improvement Company before the Interstate Commerce Commission complained only of the ten cent fare charged for a ride upon the lines of the Omaha & Council Bluffs Railway & Bridge Company from Council Bluffs, Iowa, to the eastern limits of the City of Omaha, and the prayer was that the railway companies be required "to make and fix maximum passenger fares to apply in future to the transportation of passengers *from Council Bluffs to Omaha,* and *the reverse,* which shall not exceed five cents (5c) per passenger, or such charge as the Commission shall find reasonable and just." See record, p. 2, folio 3.

The order made by the Commission *did not* reduce the ten cent fare from Council Bluffs, Iowa, to Omaha, Nebraska, but to the contrary left the 10 cent fare in force to passengers who traveled between the two cities.

The order as made requires the Omaha company to fix "*a charge for the transportation of passengers from any point on defendant's lines in Council Bluffs, Iowa, to any point on defendant's lines in Omaha, Nebraska,*

or from any point on defendant's lines in Omaha, Nebraska, to any point on defendant's lines in Council Bluffs, Iowa," not exceeding ten cents per passenger. See record top page 5.

The effect of said order is that when a passenger shall have paid 10 cents from Council Bluffs, Iowa, to Omaha, Nebraska, on the bridge line, he may get on board a car of the Omaha company and ride to any point within the city limits of Omaha *without paying any additional fare.*

The cars of Omaha & Council Bluffs Railway & Bridge Company pass on its lines from Council Bluffs to Omaha, thence around a loop in Omaha and return to Council Bluffs. Such was the manner of operation before the bridge company leased its lines to the Omaha company, and the same method of operation is still continued.

The cars of Omaha & Council Bluffs Street Railway Company (the Omaha company) are operated independently, so that a passenger upon the cars of either company, who may desire to take the cars of the other company, must leave the car of the one line, and take the car of the other line at some street intersection. There is no continuous operation of the cars of the one line upon and over the tracks of the other line. Neither is there any connecting depot for connections or transfers.

When a passenger gets aboard a car of the Bridge company at Council Bluffs and reaches Omaha he has completed his travel on that line. If he desires to go to any other point in Omaha he leaves that line and takes a car on the Omaha line at any convenient point at which he may find it, just as any passenger in Omaha may get

aboard a car of the Omaha line. When he gets aboard a car of the Omaha line, there is nothing to indicate that he may have come from Council Bluffs, or that he may have been a passenger on the Bridge line. Neither is there any way to know that he has paid a 10 cent fare from Council Bluffs to Omaha. If he got aboard a bridge car at a point between Council Bluffs and Omaha he would have paid a 5 cent fare, not a 10 cent fare. Hence such passenger would not be entitled under the order of the Commission to a transfer on the Omaha lines.

Again, how is anybody to know when the passenger gets aboard a car at Council Bluffs and pays to the conductor a 10 cent fare, that he intends to ride beyond the loop of the Bridge line? How is a conductor on the Omaha line to know that *one* man of the thousands of people who ride on the *Omaha* cars intends, when he leaves that car to get aboard a Bridge line car and go to Council Bluffs? It isn't like the case of a traveler on a commercial railroad who buys a ticket from one termini to another in different states. The Street railway charges a flat fare of 5 cents to all points within the City of Omaha. It is likewise a flat fare of 5 cents to all points within the City of Council Bluffs. When a passenger is carried across the bridge over the Missouri river, an additional charge of 5 cents is made on the Bridge line (which is the same fare charged to a foot passenger going over said bridge). The result is that the 10 cent fare from Council Bluffs to Omaha is but a 5 cent fare from point to point within the limits of Council Bluffs, plus the *bridge toll rate* for crossing the bridge, 5 cents. When he reaches Omaha his journey is completed so far as the Bridge line goes.

Under the circumstances what power is vested in the Commission to make an order requiring the *Omaha company* to permit a passenger who has paid the 10 cent fare from Council Bluffs to Omaha on the Bridge line, to get upon the cars of the Omaha company and travel to any point within the corporate limits of that city without paying *any additional compensation,* when he has become purely an intrastate passenger so far as the Omaha company is concerned? The single fact that the Omaha company operates the lines of the Bridge company under a lease does not change the *actual situation.* The manner of operation has not been changed. The two companies are still operated as independent companies, just as much so as they were before the lease was made.

Again, the order as made by the Commission does *not affect travel* on the line of the *bridge company.* It does not affect the fare paid for riding over the bridge nor the fare paid from Omaha to Council Bluffs, or the reverse. *Its only effect is that when a man has ridden from Council Bluffs to Omaha and paid a 10 cent fare, that he may get on an Omaha car and ride ten or twenty miles farther without paying to that company any compensation at all. The query is what authority had the Commission to make this order?*

Our claim is that the order of the Commission is beyond the scope of the relief prayed, and is one that the Commission did not have jurisdiction to make.

JOHN LEE WEBSTER,
Solicitor for Appellants.

FREDERIC D. MCKENNEY,
Of Counsel.

APPENDIX.

"OMAHA & C. B. ST. RY. CO. ET AL., V. INTERSTATE COMMERCE COMMISSION, (179 FED., 243.)

(Circuit Court, D. Nebraska. April 25, 1910.)

CARRIERS (§24*)—Interstate Carriers—Regulation of street railroads. Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), or its amendments (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), being acts to regulate commerce do not apply to street railway companies engaged in the transportation of passengers between cities in different states.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §24*].

IN EQUITY. Suit by the Omaha & Council Bluffs Street Railway Company and another against the Interstate Commerce Commission. Motion for a preliminary injunction granted.

JOHN LEE WEBSTER, for complainants.

P. J. FARRELL and CHARLES A. GOSS, for defendant.

Before SANBORN, HOOK and ADAMS, Circuit Judges.

PER CURIAM. Whereas, the complainants are street railway companies engaged in operating street cars for the transportation of passengers on the streets of Omaha and Council Bluffs, and are not commercial railroad companies engaged in the general transportation of freight and passengers, and the Interstate Commerce Commission by its order dated November 27, 1909, required them to cease demanding or receiving their fares of 15 cents per passenger for the transportation of passengers from Council Bluffs, not including Courtland Beach, Iowa, to points on complainants' lines in Omaha, Nebraska, or from points on complainants' lines in Omaha, Nebraska,

to Council Bluffs, Iowa, not including Courtland Beach, Iowa, and also required them to establish and to maintain for two years a less rate.

And, whereas, the judges are of the opinion that the Congress never intended that the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [3 U. S. Comp. St. 1901, p. 3154]), or its amendments (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), should apply to, and they are of the opinion that they do not apply to such street railway companies, that no power has been delegated thereby to the Interstate Commerce Commission to regulate or affect the rates of transportation of such companies, and that the order of the Interstate Commerce Commission was beyond its powers, and ought not to be enforced during the pendency of this suit. *Louisville & Portland Ry. Co. v. Louisville City Ry. Co.*, 2 Duv. (63 Ky.) 175-178; *Funk v. St. Paul Ry. Co.*, 61 Minn. 435, 437, 441, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608; *State v. Duluth Gas & Water Co.*, 76 Minn. 96, 108, 78 N. W. 1032, 57 L. R. A. 63; *Manhattan Trust Company v. Sioux City Cable Ry. Co.* (C. C.) 68 Fed. 82, 86 Congressional Record, vol. 17, part 4, p. 3472; *Railroad Commissioners v. Market Street R. R. Co.*, 132 Cal. 677, 678, 679, 682, 683, 64 Pac. 1065; *Gyger v. West Philadelphia Ry. Co.*, 136 Pa. 96, 108, 20 Atl., 399; *State of Kansas v. Grant Cain*, 69 Kan. 186, 189, 190, 76 Pac. 443; *Railroad Company v. Railroad Commissioners*, 73 Kan. 168, 169, 173, 84 Pac. 755; *Sams v. St. Louis, etc., Ry. Co.*, 174 Mo. 53, 64, 69, 74-77, 81, 73, S. W. 686, 61 L. R. A. 475; *Thompson Houston, etc., Co. v. Simon*, 20 Or. 60, 75, 25 Pac. 147, 149, 10 L. R. A. 251, 23 Am. St. Rep. 86; *Front Street Cable Ry. Co. v. Johnson*, 2 Wash. St. 112, 25 Pac. 1084, 1085, 11 L. R. A. 693;

Riley v. Galveston City R. R. Co., 13 Tex. Civ. App. 247, 35 S. W. 826, 827.

It is hereby ordered that the aforesaid order of the Interstate Commerce Commission of date November 27, 1909, be, and the same is hereby, suspended, and the Commission, its attorney, agents, and employees, are hereby restrained and enjoined from enforcing it until the final decision of this suit or the further order of the court.

This order shall take effect upon the filing with the clerk of the court of a bond in the sum of $10,000, approved by one of the judges of this court, and conditioned that the complainants will pay any and all damages which result from the making of this order in case the order shall not be sustained."

EXCERPTS FROM THE CONSTITUTION AND STATUTE LAWS OF THE STATE OF NEBRASKA.

Article XI of the Constitution of Nebraska, adopted 1875, contains provisions relating to the creation and regulation of "railroad corporations." Sections 3, 4 and 8 of said Article XI severally provide:

"Sec. 3. No railroad corporation, or telegraph company, shall consolidate its stock, property, franchises, or earnings in whole or in part, with any other railroad corporation or telegraph company owning a parallel or competing line; and in no case shall any consolidation take place, except upon public notice of at least sixty days, to all stockholders, in such manner as may be provided by law."

"Sec. 4. Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared *public highways,* and shall be free to all persons for the transportation of their *persons and property thereon,* under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable *maximum rates of charges for the transportation of passengers and freight* on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited."

Article XIb of the Constitution of the State of Nebraska under the heading of "*Miscellaneous Corporations*" relates in part to street railway companies and provides in Section 2:

"Sec. 2. No such general law shall be passed by the legislature granting the right to construct and operate a *street railway* within any city, town, or incorporated village, without first requiring the consent of a majority of the electors thereof."

Sections 72, 73 and 75 of Chapter 16, Compiled Statutes, 1911, p. 596-7:

"Sec. 72. Any number of natural persons, not less than five, may become a body corporate with all the rights, privileges and powers conferred by, and subject to all the restrictions of this subdivision."

"Sec. 73. Any number of persons, as aforesaid, associating to form a company for the purpose of constructing a railroad, shall, under their hands, make a certificate, which shall specify as follows: *First*—The name assumed by such company and by which it shall be known. *Second*—The names of the places of the termini of said road, and the *county or counties through which said road shall pass. Third*—The amount of capital stock necessary to construct such road. Such certificate shall be acknowledged before a notary public, and certified by the clerk of the district court in the same manner as is provided for the conveyance of real estate, and shall be forwarded to the secretary of the state, who shall record and carefully preserve the same in his office; and a copy thereof duly certified by said secretary, under the seal of the state, shall be *prima facie* evidence of the existence of such corporation."

"Sec. 75. Such corporation shall be authorized and empowered to lay out, locate, construct, furnish, maintain, operate, and enjoy a railroad with single or double tracks, with such sidetracks, turnouts, offices and depots as shall be necessary, between the places of the termini of the said road, commencing at or within, and extending to or into any town, city or village named as the termini of said road, and construct branches from the main line to other towns or places within the limits of this state. Provided, further, that any railroad company heretofore organized or hereafter to be organized for the construction and operation of a railroad whether by steam or other motive power, shall have the right and power to transmit over its right of way currents of electricity for the pur-

pose of operating telegraph and telephone lines and for the purpose of supplying power for the use of said railroad and the use of others."

Section 1, Article 7, Chapter 72:

"Any number of persons may be associated and incorporated under the general laws of this state providing for the creation of corporations for the purpose of constructing and operating a *street railroad* within any of the *cities* of this state, upon procuring the *consent* of a majority of the electors of any such city as hereinafter provided."

"*And provided further,* That no franchise to construct street railways shall be hereafter granted, nor shall any election be hereafter held to vote upon any proposition to give the consent of the electors of any such city to the construction of any street railway, unless there shall have been filed, at least ten days before such election, a map or plat showing the route and location of the proposed street railway in the county office wherein are kept the record of deeds of real estate and also whether the proposed railway along such route is to be a single or double track."

Section 5 of Article 7 contains the following provisions:

"But no *street railway* shall hereafter be constructed, or consent or authority therefor be given by any city, or its electors, upon, or along any part of any street in any city upon or along which any street railway has been already constructed, and where any other company or party owns any street railway upon any part of such street it is hereby authorized and empowered to consent to the use of any part of its railway by any other company upon such terms as may be agreed upon by them; *Provided,* That no such use shall be allowed or enjoyed without its consent; *Provided further,* That no authority to

construct street railway on any street of any city in this state under any franchise hereafter granted, or consent of the electors of any such city thereto hereafter given, shall be operative or effective unless the owners of a majority of the feet front of the real property abutting upon the street or streets upon which it shall be proposed to construct any such street railway shall in writing consent thereto, which written consent shall be filed in the office of the city clerk of the city wherein such street is situated before any election to give the consent of the electors of such city shall be called."

Sec. 12 of Article 7, Chapter 72, reads:

"The word '*street railway,*' as used in the foregoing section, shall be constructed to embrace all *street railroads* built and operated for the convenience of *passengers* along the streets and alleys and public thoroughfares of cities in this state."

Sec. 12a of Article 7, Chapter 72.

"Any street railway company, whose line or lines of street railway are constructed to the corporate limits of the city in which it owns and operates a street railway system, may extend one or all of its lines so constructed beyond such corporate limits for a distance not exceeding ten miles. When the line or lines of railway constructed and owned by an inter-urban company connect with the line or lines of railway of a street railway company, a street railway company may for the purpose of extending its service into the suburbs, purchase or lease so much of the railway of an inter-urban company as lies outside the corporate limits of the city, not exceeding in length ten miles from the corporate limits."

SUPREME COURT OF NEBRASKA

STATE EX REL. TYRRELL,
Plaintiff,
vs.
LINCOLN TRACTION CO.,
Defendant.

No. 17232.

OPINION FILED JAN. 3, 1912.

2. Section 3, Art. XI of the Constitution, which prohibits the consolidation of the stock, property, franchises or earnings in whole or in part of railroad corporations and telegraph companies owning parallel or competing lines, does not apply to street railway corporations not engaged in general railroad or telegraph business.

3. Section 5, Art. XI of the Constitution, which forbids a railroad corporation issuing any stocks or bonds except for money, labor or property actually received and applied to the purposes for which such corporation was created, does not apply to street railway corporations not engaged in general railroad business.

ROOT, J. The state invokes Art. XI of the Constitution to sustain its contention that the stock and bond issues should be cancelled and the consolidation adjudged null and void. Among other things Sec. 3 of Art XI, *supra,* forbids the consolidation of the stocks, property, franchises or earnings of two or more railroad corporations or telegraph companies owning competing or parallel lines and section 5 of that article provides that no railraid corporation "shall issue any stock or bonds, except for money, labor or property actually received and

applied to the purposes for which such corporation was created: and all stock, dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void."

In *City of Lincoln vs. Lincoln Street R. Co.*, 67 Neb., 469, 483, it was suggested but not determined that these provisions of the constitution do not apply to street railway companies. In the instant case we are of opinion that the point is fairly presented and should be determined. No such limitations appear in the constitution of 1866. It is a matter of common knowledge that many of the provisions of our constitution were taken from the 1870 constitution of Illinois. Sections 3, 5, Art. XI of the Constitution of Nebraska, are quite similar to sections 11, 13, Art. XI of the 1870 Constitution of Illinois. In 1870 the agitation which gave birth to the granger laws of the Western states was active, and the people of Illinois were determined that competition should continue between the common carriers for hire of freight and passengers. These conditions existed in a more acute form in Nebraska in 1875 when our present constitution was adopted. The evils growing out of the circulation of railroad stocks and bonds that had been issued without consideration or for a grossly inadequate consideration, were also known in 1870 and in 1875. But so far as we are advised street railways were not during those years considered an inviting field for exploitation and the people of Nebraska gave that subject no more thought than to adopt Section 4, of Art. XI, which forbids the general assembly to grant the right to construct or operate a street railroad within the limits of any city, town or incorporated village without the consent of the local authorities having

control of the streets and highways of the municipality. As we are advised but one street railway had been constructed in this state in 1875.

In section 72 *et seq.*, ch. 25, Rev. St. 1866, may be found comprehensive provisions for the incorporation by general law of railroad companies. But it was not until 1877 that the legislature enacted statutes referring specifically to the incorporation of street railway companies. (Laws, 1877, p. 135.) It is not improbable that theretofore such corporations might have been formed under the provisions of section 123 *et seq.*, ch., 25, Rev. St. 1866, relating generally to corporations, yet in 1867 the territorial legislature granted a special charter to the Omaha Horse Railway Company to construct and operate a street railway in the city of Omaha and within a radius of five miles of its limits. The legislature by the act of February 25, 1875, purported to grant to the first corporation that should build and operate a street railway in any of the cities in Nebraska, exclusive franchises for 25 years. Complete Session Laws, p. 884. In 1875, Omaha was the only city in Nebraska containing sufficient population to justify the maintenance of a street railway. At that time there were no evil practices with respect to street railways to be remedied in Nebraska and no reason to expand by construction the popular definition of the word "railroad." In its broadest significance that word includes a street railway but its meaning depends upon the context and general intent of the written law in which it is used. *City of Chicago vs. Evans*, 24 Ill., 52. Because the administrative branch of the government by a practical construction of a revenue law had construed the word "railroad" to mean street railways, the supreme court of Florida so held.

Bloxham vs. Consumers' E. L. & Street R. Co., 36 Fla., 519, 51 Am. St. Rep. 44. But it is said in substance in that case by Liddon, J., that the word generally applies to commercial railways engaged in the transportation for long distances of freight and passengers, whereas, the words "street railway" apply solely to railways laid upon the surface and grade of the street and so constructed as not to exclude the public from the use of that part of the street.

In *State vs. Duluth Gas & Water Co.*, 70 Minn. 96, 107, Mitchell, J., in classifying street railways and railroads said "Speaking generally, a street railway is local, derives its business from the streets along which it is operated, and is in aid of the local travel upon those streets, while a commercial railway usually derives its business, either directly, or indirectly through connecting roads, from a large area of territory, and not from the travel on the streets of those cities, either terminal or way stations, along which they happen to be constructed and operated. In fact, so far from being an aid or advantage, they are a positive impediment, to the travel on such streets." See also *Caril vs. Stillwater Street R. & T. Co.*, 28 Minn., 373; *Minneapolis & St. P. S. R. R. Co. vs. Manitou Forest Syndicate*, 101 Minn., 132; 112 N. W. 13; *Louisville & P. R. Co. vs. Louisville City R. Co.*, 2 Duval (Ky.), 175; *Lincoln Street R. Co. vs. McClellan*, 54 Neb. 672.

The terms of a constitution should be construed according to their plain and ordinary acceptation unless it is evident they were used in a legal or technical sense.

State vs. Bacon, 6 Neb., 286.
State vs. Lancaster County, 6 Neb., 474.

Hamilton Natl. Bank vs. American Loan & Trust Co., 66 Neb., 67.

Wilcox vs. People, 90 Ill., 186, 196.

Considering the mischief which article XI of the constitution was adopted to remedy, the general history of the state in 1875 and giving the words in sections 3 and 5 of that article their ordinary meaning, we are of opinion that those sections were not intended to, do not purport to, and do not as a matter of law relate to, street railways. These constitutional provisions, therefore, do not authorize the court to dissolve the respondent or to cancel any part of its capital stock.

[redacted]

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 846.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY AND OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY, APPELLANTS,

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES, APPELLEES.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF AND ARGUMENT ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

PLEADINGS.

In February, 1910, appellants filed a bill in equity in the Circuit Court of the United States for the Northern District of Nebraska, against the Interstate Commerce Commission, praying for a temporary and permanent injunction suspending and restraining the enforcement of an order of the commission entered on the 27th day of November, 1909. The order required the appellants "to cease and desist, on or before the first day of February, 1910, from charging, demanding, collecting, or receiving their

present fare of 15 cents per passenger for the transportation of passengers from Council Bluffs, Iowa, not including Courtland Beach, Iowa, to points on defendants' lines in Omaha, Nebr., or from points on defendants' lines in Omaha, Nebr., to Council Bluffs, Iowa, not including Courtland Beach, Iowa," and further requiring the appellants "to establish on or before the first day of February, 1910, and maintain in force thereafter during a period of not less than two years, a charge for the transportation of passengers" upon the lines and between the points above named "which shall not exceed 10 cents per passenger."

The Interstate Commerce Commission filed a demurrer to said bill, excepting paragraph 10, and an answer to paragraph 10, admitting its allegations and setting up the report and conclusions of the commission referred to in, and made a part of, said order.

The application for a preliminary injunction was heard by the Circuit Court, all parties appearing, on the 2d day of March, 1910, and on the 25th day of April, 1910, a temporary restraining order was granted by the Circuit Court.

The case was transferred to the United States Commerce Court on the 3d day of April, 1911, and the United States intervened and filed a motion to dissolve the injunction and dismiss the petition.

The case was heard upon the bill of complaint, the demurrer and answer of the Interstate Commerce Commission and the motion by the United States.

STATEMENT OF FACTS.

1. The Omaha & Council Bluffs Street Railway Company owns the street railway lines in the city of Omaha and adjacent municipalities in Nebraska; it leased from appellant the Omaha & Council Bluffs Bridge Railway Company, under a long lease, the street car lines of Council Bluffs, Iowa, the toll bridge, and the interurban line over the Missouri River connecting the street car systems in these two cities; *this appellant maintains and operates all of the car lines in both cities and across the bridge and the toll bridge, which also accommodates wagons, foot passengers, etc.*

The other appellant, Omaha & Council Bluffs Bridge Railway Company, *is not now an operating company.*

The controversy in this case, therefore, is wholly with the Omaha & Council Bluffs Street Railway Company.

2. The Omaha & Council Bluffs Railway & Bridge Company, now the lessor, was organized under the laws of Iowa in October, 1886, with power to construct, operate, and maintain a bridge across the Missouri River at and opposite the cities of Omaha, Nebr., and Council Bluffs, Iowa, and also a *steam, electric, motor, horse, elevated, cable, or other line of railway,* and a public highway across a bridge within the counties of Douglas, Nebr., and Pottawattamie, Iowa, with the termini thereof in the said cities of Omaha and Council Bluffs, with all the privileges given it by law and such as are usually extended to corporations of this character.

3. By an act of Congress approved March 3, 1887, authority was granted to the bridge company, "its successors and assigns," to construct and maintain a toll bridge across the Missouri River between the cities of Omaha and Council Bluffs, "as shall best promote the public convenience and welfare and the necessities of business and commerce," to be—

> constructed, maintained, and used as a combined highway and wagon bridge for the safe and convenient passage of wagons, carriages, stock, steam, cable, and street cars, foot passengers, and all road travel * * *, and said bridge shall be recognized and known as a post route * * * and enjoy the rights and privileges of other post routes in the United States; and Congress reserves the right at any time to regulate, by proper legislation, the charges for freight and passengers over said bridge; all railroad companies desiring the use of said bridge shall have and be entitled to equal rights and privileges relative to the passage of railway trains or cars over the same and over the approaches thereto upon payment of a reasonable compensation for such use; * * * that the United States shall have the right of way for such postal and telegraph lines across the said bridge as the Government of the United States may construct and control.
>
> That Congress shall have power at any time to alter, amend, or repeal this act. (U. S. Stat. L., vol. 24, chap. 356, p. 501.)

The toll bridge across the Missouri River and street railway lines in Council Bluffs, with a line extending

over and across the bridge to the west end thereof, were constructed by the bridge company and operated until about December, 1902. By an arrangement with the Omaha Street Railway Company the cars crossing the bridge passed the western terminus of the bridge and over the lines of the street railway around a loop in the business portion of Omaha, returning across the bridge to Council Bluffs. The fare charged by the bridge company during the time that it operated these lines was 5 cents within Council Bluffs and 5 cents additional per passenger crossing the bridge to any point on the loop, making the fare from *any point* in Council Bluffs to any point *on the loop* in Omaha 10 cents per passenger.

4. The Omaha & Council Bluffs Street Railway Company is organized under the laws of the State of Nebraska, and owns all of the street-car lines in the city of Omaha and the suburbs named. Up to December, 1902, it operated said street-car lines wholly within the State of Nebraska and charged a flat fare of 5 cents per passenger.

5. In December, 1902, the bridge company leased all of its property, including the bridge and the street railways in Council Bluffs, to the Omaha & Council Bluffs Street Railway Company for a period of years, and since that date the toll bridge, the street-car lines in Council Bluffs, and the interurban line over and across the bridge to Omaha have been and are now operated by the Omaha & Council Bluffs Street Railway Company, which company, as is alleged in the sixth paragraph of the bill, "has the absolute

and unlimited control over the said line of said railroad * * * [bridge company's lines] and receives all rents, fares, and revenues derived in the said operation of said line of electric street railroad, including the said bridge, and utilizes its own cars and its own employees in operating these railways.

It is alleged in the bill that after the execution of the lease the cars were operated in the same manner as before. A charge of 10 cents per passenger is made between *any point* in Council Bluffs across the bridge to or from any point upon the loop, and in addition a charge of 5 cents upon the company's car lines in Omaha, making a through fare either way from or to *any* point in Council Bluffs from or to *any point* in Omaha 15 cents. The company sells a commutation ticket entitling the purchaser (nontransferable) to 30 rides for $1.50, or 5 cents between *any point* in Council Bluffs to *any point on the loop* either way.

6. A complaint was filed with the Interstate Commerce Commission and an investigation instituted regarding the alleged unreasonableness of the rates charged to interstate passengers by the complainants, Omaha & Council Bluffs Street Railway Company, over the lines which it operated as owner and lessee. After a full hearing and due consideration of all facts pertaining to the question the commission announced its opinion and conclusions "that a reduction of defendant's fare [Omaha & Council Bluffs Street Railway Company] of 10 cents to 5 cents would not be justified, but that *limiting the 10-cent fare to points on the loop in Omaha* is unjust

and unreasonable, and that the fare from Council Bluffs, not including Courtland Beach, to any point on defendant's lines in Omaha or from any point on defendant's lines from Omaha to Council Bluffs, not including Courtland Beach, should not exceed 10 cents for a continuous trip or for a trip upon which passenger conforms to proper and reasonable regulations governing the use of transfer tickets, if transfer is required." Upon these conclusions the order complained of was entered.

7. Upon the foregoing facts the Commerce Court held:

> The lines from the bridge in Omaha to and through the loop do not constitute a system separate and distinct from those beyond the loop. Both are under the common ownership, control, and operation of the street railway company. Local passengers pay a single fare within the city of Omaha between all points, receiving the necessary transfers at junction points to and from the loop.
>
> The question presented was, therefore, not whether an independent company operating solely in Omaha beyond loop points and exchanging transfers solely for local passengers with an interstate company operating the loop lines could be compelled to give transfers to interstate passengers as well—as to which we intimate no opinion—but whether or not the interstate company, operating all the lines as one system, the parts of which are independently operated only in a physical sense, in that transfers are necessary from and to the loop,

could be compelled, without additional compensation, to carry an interstate passenger to a point on its own lines beyond the loop district; in other words, whether 15 cents is or is not a reasonable fare to be paid for the entire interstate journey made on the several lines operated by the street railway company.

* * * * *

If the language be broad enough to include such a corporation as the present street railway company, and there is no contention but that "railroad" may be and frequently is synonymous with or inclusive of "street railways," it is, moreover, immaterial that Congress may not specifically have intended to confer jurisdiction over the few comparatively insignificant interstate horse street railways of 25 years ago.

A statute of the scope of the interstate commerce act, designed to regulate the vast interstate transportation business of the country, is not to be narrowly interpreted—any more than the Constitution—in accordance with the economic or physical conditions prevailing at the time of its adoption. Then, too, the decision in *Wabash, St. Louis, etc., Railway Co.* v. *Illinois* (118 U. S., 557), definitely denying to the States the right to fix or regulate interstate rates for passengers, and thereby necessitating some congressional action, is as applicable in its reasoning to interstate street railway rates as to those of commercial railroads. Unless the commission has jurisdiction over those rates they are absolutely uncontrolled.

* * * * *

Finding substantially nothing either in the language of the statute or in the history of this legislation that indicates an intent to exclude interstate passenger street railways from its operation, and finding, on the contrary, that the words of the act are broad and comprehensive enough to include them and that some at least of the evils sought to be remedied by this legislation can be corrected only if the commission have such jurisdiction, we are compelled to differ from the views expressed by the Circuit Court in granting the preliminary injunction, and to hold that power has been delegated to the commission to regulate rates of transportation by such companies as the complainants herein, which requires us to sustain the demurrer of the defendants and to dismiss the bill. And it is so ordered.

From this decision an appeal was taken to this court.

QUESTIONS OF LAW.

I.

The power of Congress to regulate commerce is not confined to any particular agency or instrumentality.

The power of Congress is determined by two clauses of the Federal Constitution: (1) * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes * * *. Art. 1, sec. 8, para. 3. (2) * * * To make all laws which shall be necessary and proper for carry-

ing into execution the foregoing powers, * * *. Art. 1, sec. 8, par. 18.

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. *Gibbon* v. *Ogden* (9 Wheat., 1, 196); *McCulloch* v. *State of Maryland et al.* (4th Wheat., 316); *Employers' Liability Case* (207 U. S., 493).
>
> It will be observed that in fixing the power of Congress to regulate, no reference is made to the kind or character of the agency, or instrumentality used in such commerce. It is the commerce itself which determines the jurisdiction of Congress over it. If it is commerce between the States, no matter how it may be carried on, it falls within the exclusive jurisdiction and power of Congress. *Gibbon* v. *Ogden, supra.*

In *Hopkins* v. *United States*, 171 U. S., at page 597, this court, speaking through Mr. Justice Peckham, said:

> Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate

it embraces all the instruments by which such commerce may be conducted. *Welton* v. *Missouri*, 91 U. S., 275; *Citing Mobile County* v. *Kimball*, 102 U. S., 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196; *Hooper* v. *California*, 155 U. S., 648, 653; *United States* v. *E. C. Knight Co.*, 156 U. S., 1.

Commerce as used in the commerce clause of Constitution has reference to transportation, that is, the movement of either property or persons. *Chicago, etc., R. Co.* v. *Fuller* (17 Wallace, U. S., 560).

The boats of the appellant were, we are told, employed in the transportation of passengers; and this is no part of that commerce which Congress may regulate * * * no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that Government, which has been thought best fitted for the purpose generally. *Gibbon* v. *Ogden, supra;* see also *Passenger Cases* (7th Howard, U. S., 283).

II.

Congress exercises its regulating power by direct legislation and through the Interstate Commerce Commission acting under the powers granted by the act to regulate commerce.

Congress exercises its regulating power by appropriate legislation executed by administrative officers and mainly by the Interstate Commerce Commission.

Act to regulate commerce, as amended, and acts supplementary thereto.

Texas, etc., R. Co. v. *Interstate Commerce Commission* (162 U. S., 197).

Cincinnati, etc., R. Co. v. *Interstate Commerce Commission* (162 U. S., 184).

Baltimore & Ohio Railroad Co. v. *U. S. ex rel., etc.* (215 U. S., 481).

Interstate Commerce Commission v. *C., R. I. & P. Ry. Co.* (218 U. S., 88).

Southern Pacific Company v. *Interstate Commerce Commission* (219 U. S., 433).

Southern Pacific Terminal Co. v. *Interstate Commerce Commission* (219 U. S., 498).

Interstate Commerce Commission v. *D., L. & W. R. R. Co.* (220 U. S., 235).

III.

The act to regulate commerce as amended defines the carriers subject to the act.

That the provisions of this act shall apply to * * * any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad * * * from one State * * * to any other State or Territory of the United States * * *:

Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property * * * wholly within one State * * *.

The term "railroad" * * * shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, * * *; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage * * *; and it shall be the duty of every carrier subject to the provisions of this act * * * to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations * * * for the operation of such through routes and providing for reasonable compensation to those entitled thereto. Section 1, act to regulate commerce.

Every common carrier subject to the provision of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting line; * * *. Section 3.

> The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, * * *.
>
> And in establishing such through route, the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, * * *. Section 15.

It will be observed that Congress in conferring this power upon the Interstate Commerce Commission limited it to "interstate commerce" carried on by certain agencies and instrumentalities. In so far as the issues in this case are concerned, the agency and instrumentality which determines the jurisdiction of the Interstate Commerce Commission are a "common carrier" transporting passengers *or* property wholly by railroad (and a bridge) from one State to another State. Nothing is said in the act as to the motor power that shall be used by the carrier, or the size or character of the vehicles used, or the nature of the roadway, excepting that it shall be a "railroad" or a "bridge."

IV.

Congress and the Interstate Commerce Commission have jurisdiction over a common carrier operating cars by electricity, and the fact that it is an electric street railway does not exempt it from such regulating power.

LEGISLATIVE CONSTRUCTION.

The act to regulate commerce has received legislative construction. The Rock Creek Railway Company of the District of Columbia owns and operates an electric railroad between the city of Washington, D. C., and Chevy Chase, Maryland. The length of the road is approximately seven and one-half miles, of which five and one-half miles are in the District of Columbia and the remainder in the State of Maryland. This road operates as a street-car line in all particulars, stopping at any street crossing to receive or discharge passengers. In a complaint filed against this company it was held by the commission:

> We can not sustain defendant's contention that the act to regulate commerce applies only to the ordinary steam railways by which interstate traffic is mainly carried, and that street surface roads for urban and suburban passenger travel are exempt from its provisions. * * * We see no reason to doubt that the authority of this enactment may be invoked for the regulation of carriers like the defendant, if their business is actually interstate, whenever occasion arises for subjecting them to its restraints and requirements. *Willson* v. *Rock Creek R. Co.* (I. C. C. Rep., vol. 7, 83, 88.)

The above decision was rendered March 12, 1897.

See also *Chicago & Milwaukee Electric R. R. Co.* v. *Illinois Central R. R. Co. et al.* (13 I. C. C. Rep., 20), decided December 2, 1907; *O. C. Beall* v. *Washington, Alexandria & Mt. Vernon Ry. Co.* (20 I. C. C. Rep., 406), decided February 13, 1911; *Cincinnati & Columbus Traction Co.* v. *B. & O. S. W. R. R. Co. et al.* (20 I. C. C. Rep., 486), decided March 14, 1911.

Subsequently, in 1910, Congress, with knowledge that the Interstate Commerce Commission had taken jurisdiction of this Wilson case and other electric street railways carrying interstate passengers, amended the act to regulate commerce in several particulars, among which amendments is a provision, incorporated in section 15, reading as follows:

> The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character.

This exception to powers then being granted shows that Congress understood that street electric passenger railways were subject to the act if they transported passengers from a point in one State or Territory or the District of Columbia to a point in another State. For, as Chief Justice Marshall so well reasoned with reference to powers granted to Congress by the Constitution of the United States, "Limitations of a power furnish a strong argument in favor of the existence of that power." *Gibbon* v. *Ogden, supra.*

If the act to regulate commerce did not include "street electric passenger railways" there was no reason for excepting this class of railways from the additional power conferred upon the commission to establish through routes and joint rates.

JUDICIAL CONSTRUCTION.

The street railroad is a common carrier. *State ex rel. Grinsfelder* vs. *Spokane Street R. Co.* (53 Pac., 719).

Technically, a railroad is a way or road upon which iron rails are laid for wheels to run on for the conveyance of heavy loads and vehicles. *Densmore* v. *Racine M. R. Co.* (12 Wis., 649).

The term "railroad" as applied in our general legislation relates to interests of quasi-public character, to highways or roads constructed by the authority of a State, with fixed metallic rails on which carriers may propel their carriages or cars speedily in the transportation of passengers and freights. Any way or road having these characteristics is a railroad. It is the mode of construction and chartered used and not the motive power that determines the character of a railroad. *McCleary* v. *Babcock* (82 N. E., 453, 456).

So it appears, after all, we must look to the context of the statute before the court, and, upon taking into account its object and purpose, determine in each case upon its peculiar facts, the meaning of the word "railroad" therein employed, when endeavoring to ascertain to what class or character of railroads the

> legislature intended to provide the legislation provided, and in no case can an actual determination and the result be had except by constant vigil as to the mischief sought to be prevented and the remedy sought to be provided by the act. *Riggs* v. *San Francois County Ry. Co.* (96 S. W., 707, 708.)

There are very many cases wherein the State courts have been called upon to construe the word "railroad" used in general statutes providing for taxation, fencing right of way, employers' liability acts, liens, crossings, rolling stock, etc., and the general rule above stated has been applied in determining whether the statutes applied to street railways. In some of these cases it was held to apply, and in many others the statutes under consideration have been held inapplicable to street railroads.

In Pennsylvania an act provided that—

> The offices, depots, car houses, and other real property of railway corporations, * * * the superstructure of the road and water stations alone excepted, should be subject to taxation by ordinance.

The Supreme Court of Pennsylvania said: "The words 'railway' and 'railroad' have been used indiscriminately by the legislature and have no strict technical meaning in our statutes * * *. The rule established by our decisions is that these words used in the statutes will be considered as synonymous, and either will be held to apply to both kinds of road unless there appears from the title of the act, its pur-

pose or context, something to indicate that a particular kind of a road is indicated."

Citing—

Heastonville R. R. Co. v. *Philadelphia* (89 Pa., 210).

Gyger v. *Phila. City Pittsburg R. Co.* (136 Pa., 96).

Cheaton v. *McCormick* (178 Pa., 186).

Old Colony Trust Co. v. *Rapid Transit Co.* (192 Pa., 596).

Penn. R. Co. v. *Pittsburg* (104 Pa., 552).

A traction company has but little resemblance to a street railway company, and more to a construction or power company; but when, as in this case, it operates a railway and leases the property and franchises of various railway companies and operates them on its account, it is exercising the functions of a street railway company, as it is authorized to do, and it enjoys the privileges granted to and becomes subject to the liabilities imposed by law upon such companies. This view is in harmony with all of our decisions touching the subject.

Rafferty v. *Central Traction* (147 Pa., 579).

Reeves v. *Phila. Tr. Co.* (152 Pa., 153).

Old Colony Trust Co. v. *Allentown, etc.* (192 Pa., 596).

Employers' Liability Cases (207 U. S., 463, 497).

Applying this rule of construction to the act to regulate commerce, we find that the general purposes of the act are to provide and control the regulation of quasi-public corporations that are carrying passengers or property from one State, Territory, or the District

of Columbia to another State, Territory, or the District of Columbia. This power of regulation having been vested in Congress can only be exercised under the authority of Congress, and as to all railroad companies engaged in such transportation the act is intended to provide a complete and reasonable exercise of that power. If the act does not apply to electric street railways carrying on interstate transportation, then there is no power that can regulate, in the interest of the public, this interstate traffic; such traffic would be wholly outside of any regulating power. Regarding the "mischief" to be prevented and the remedy provided, the act applies to all interstate commerce by railroad.

But we are not without the authority of the Supreme Court in insisting that this power extends to such lines of railroad.

Construing the first section of the act to regulate commerce, the Supreme Court of the United States, speaking through Mr. Justice White, now Chief Justice, said:

> From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of de-

termining whether all the subjects to which it relates are to be controlled by its provisions is that any one who conducts such business be a "common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States," etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the States, etc. Employers' Liability cases, supra.

This comprehensive language includes trolley lines and every common carrier engaged in interstate traffic by railroad.

V.

The appellants are not ordinary street car companies; they are bridge and railway companies. The bridge company was not organized as a "street" railway company, but as a "railway and bridge company," and its lessee, as operating company, is exercising these functions.

The name of the lessor includes the names of cities in two States, between which transportation was to be and is carried on, Omaha and Council Bluffs Railway and Bridge Company. This is true also of the lessee, Omaha and Council Bluffs Street Railway Company, which shows an intention to carry on interstate commerce. The first company, organized in 1886, was given power by Congress to construct, operate, and maintain a bridge crossing the Missouri River at a point opposite the cities of

Omaha, Nebraska, and Council Bluffs, Iowa, and a "*steam, electric, motor, horse, elevated, cable, or other line of railway.*" and this power extends to "its successors and assigns," the lessee. The act further provides that said bridge and all property belonging thereto and connecting therewith may be constructed, maintained, and used as a combined railway and wagon bridge for the safe and convenient passage of wagons, carriages, stock, steam, cable, and street cars, foot passengers, and all road travel. * * * And Congress reserves the right, at any time, TO REGULATE, "*by appropriate legislation,*" *the charges* for freight and passengers over said bridge.

Traffic over a bridge spanning navigable waters separating two States is interstate commerce. *Covington & Cincinnati Bridge Co.* v. *Kentucky* (154 U. S., 204) and cases cited.

The character of the bridge company's railway is stated in the commission's report, page 243:

> In the instant case it should be remembered that the defendants have the characteristics of an interurban line as well as of a street railway. They operate 136 single-track miles of road; the rails are not all laid in public streets and highways, but for some distance run over private right of way; they operate over the bridge across the Missouri River, and through sparsely settled sections over expensive culverts not conforming to the level of the streets or roads; they carry the United States mail and do not serve the needs of a single city and its suburbs, but of two cities and several towns, villages, and resorts.

And on page 248 it is said:

> that along the line from the east bank of the Missouri River to the city of Council Bluffs for a distance of about three miles there is a large territory which is but sparsely settled and from which but little revenue is derived.

The railroad is an interurban road connecting two cities located respectively in two States, and such transportation and facilities constitute interstate commerce.

> *Gibbon* v. *Ogden, supra.*
>
> *Gloucester Real Co.* v. *Pennsylvania* (114 U. S., 196).
>
> *Munn* v. *Illinois* (94 U. S., 113).
>
> *C., B. & Q. R. Co.* v. *Iowa* (94 U. S., 155).
>
> *Wabash, St. L. & P. R. Co.* v. *Illinois* (118 U. S., 557).

The Omaha & Council Bluffs Railway & Bridge Company was at the beginning and is, so far as its interests are concerned at the present time, a common carrier of interstate commerce. It is the owner, and until 1902 operated, the interstate bridge and the interstate railroad between Council Bluffs and Omaha, and as such carrier was and is subject to the regulating power of Congress and of the Interstate Commerce Commission.

VI.

When the Omaha & Council Bluffs Street Railway Company voluntarily leased the bridge and lines of the Bridge Company it entered the field and became an agent of interstate commerce. It succeeded to

all the rights and privileges, and with these the obligations, duties, and responsibilities of the lessor company. What the lessor could do the lessee undertook to do and is doing. What its powers are under the constitution and laws of Nebraska are immaterial to the decision of this case. Its acts may be ultra vires, but it can not plead that against the power to supervise its interstate business. It is the fact that, right or wrong, it has assumed to carry interstate passengers, and is doing it, that determines the jurisdiction of the commission.

While it is alleged in the bill "that after the execution of the said lease from the Council Bluffs Co. to the Omaha Company the same manner of operating the cars of the Council Bluffs Company was continued," it is not alleged that the operating revenues and expenses of the two lines are segregated. And the bill further alleges that the operating company receives "all fares, rents, and revenues derived in the said operation of the said line of electric street railroad, including the said bridge, and the Omaha & Council Bluffs Street Railway Company utilizes its own cars and its own employees in operating said street railroad." It is an interstate carrier by railroad and therefore is subject to the act to regulate commerce.

The fact is that the Omaha & Council Bluffs Street Railway Company, as owner of the lines in Omaha, as lessee of the bridge, and interstate interurban line, and the lines in Council Bluffs, is the sole operating company and receives and disburses its income from these

lines as a single corporation. These instrumentalities therefore all belong to this company, are subject to its control, and are used in the transportation of interstate passengers. These interstate passengers are conveyed from any part of the city of Council Bluffs across the bridge to the loop in Omaha for a fare of 10 cents, and if they desire to go farther in Omaha they do so upon the company's lines and pay an additional fare of 5 cents, making a through rate either way between any point in Council Bluffs and any point in Omaha outside the loop of 15 cents. It was this through rate that was the subject of the order complained of in the case at bar. The statute declares:

> Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, etc.

Again, it says:

> and it shall be the duty of every carrier * * * to establish through routes and reasonable rates applicable thereto. Sec. 1.
>
> If the carrier fails to obey this law the commission may establish such through routes and rates.

This is what was done by the commission in this case.

VII.

Where several instrumentalities of commerce have been merged in one ownership by purchase or lease and are operated by one company, such instrumentalities, in so far as they are used for interstate commerce, are voluntarily brought under the jurisdiction of Congress and the Interstate Commerce Commission. The fact that one or more of such instrumentalities are used in a greater degree for intrastate business than for interstate business does not lessen the regulating power of the Interstate Commerce Commission over the interstate traffic, and the commission may establish a through route and a joint through rate for interstate traffic over all of said instrumentalities.

In the Social Circle case, this court, speaking through Mr. Justice Shiras, said:

> Having elected to enter into the carriage of interstate freights and thus subject itself to the control of the commission, it would not be competent for the company to limit that control, in respect of foreign traffic, to certain points on its road and exclude other points. *C., N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission, supra.*

And, again, speaking through Mr. Justice White, now Chief Justice, in the Employers' Liability cases, at page 490, already cited, the court said:

> From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the States, etc.

The Social Circle case was dealing directly with an intrastate corporation doing largely an intrastate business, but held, as above stated, that in so far as the company was doing an interstate business it was

brought under the control of Congress and the Interstate Commerce Commission and could not confine such control to any particular part of its road, but that the jurisdiction of the commission was coextensive with the lines of the compamy thus brought under the control of the commission. In the Employers' Liability case, above quoted, this court clearly held that, the agent of interstate commerce being being under the general regulating power of Congress, subjected itself to control by the commission.

In the case at bar interstate passengers from any part in Council Bluffs pass over the State line to any part of the city of Omaha *upon the lines of complainant,* Omaha & Council Bluffs Street Railway Company. For the entire trip these passengers are subjects of interstate commerce. The instrumentalities which are used in their transportation belong to and are operated by this company as an agent of interstate commerce. The agent and all of the instrumentalities come under the regulating power of Congress and the commission in so far as the interstate traffic is concerned.

VIII.

The commission may establish a through route and through rate.

Under the provisions of section 15 as amended the commission is expressly authorized and empowered, upon complaint, or upon its own initiative without complaint, to establish through routes and joint rates in the interest of and to facilitate the interstate traffic. The only limitation upon this power is the one here-

tofore quoted, that the commission "shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character." It is not and can not be claimed that in establishing the through route and through rate from any point in Council Bluffs to any point in Omaha over appellants' lines the electric passenger railway of Omaha was compelled to make a through route or through rate with a railroad of a different character. Neither of these roads carries freight or operates freight cars (so alleged in the bill), but are at present carriers of passengers. The prohibition therefore does not apply in this case. Where the prohibition does not apply the general jurisdiction prevails; as before stated, the exception proves the existence of the general jurisdiction over this subject matter.

The order of the commission in this case is that interstate passengers shall be carried to or from *any point* in Council Bluffs from or to *any point* in Omaha over the complainants' lines for 10 cents per passenger for a continuous trip, subject to proper and reasonable regulations governing the use of transfer tickets, if transfer is required.

IX.

The fact that these corporations are organized under State laws, general or special, as commercial or as street railways does not change the character of the commerce nor exempt the companies actually doing the interstate business from Federal regulation as to the interstate traffic.

With few exceptions all of the agents carrying on interstate commerce are State corporations. From the decision of the Supreme Court of the United States in *Gibbon* v. *Ogden* down to the present time the right of the Federal Government to control these agents has been recognized, and this power has been judicially stated in many cases.

It is the character of the commerce, not the organization of the company, that determines the question of Federal jurisdiction.

X.

The fact that this company does not carry freight, but confines its business to the carrying of passengers, does not exempt it from Federal control.

The statute reads, carriers of passengers *or* property. (*Gibbon* v. *Ogden*, supra; The Passenger Cases, 7 How., 283.)

XI.

Some general questions suggested by the allegations of the bill.

It is claimed that the State of Nebraska, acting through the municipality of Omaha, may control the fares and regulate to some extent the traffic within the city of Omaha, and therefore the Federal Government can not interfere. It is admitted that so far as the purely intrastate traffic over the lines of com-

plainant within the cities of Omaha and Council Bluffs there is no jurisdiction to regulate the fares or the traffic. On the other hand, under the authorities already cited, it is clear that the State of Nebraska has not nor has the municipality of Omaha jurisdiction over the fares for the transportation of interstate passengers. (*Covington Bridge Co.* v. *Kentucky, supra.*) For the same reasons the State of Iowa and the municipality of Council Bluffs have no jurisdiction over the interstate traffic or passenger fares.

It is clear that the only power that can regulate the interstate commerce over these lines is the Federal Government, acting through its commission. If this control is not recognized and maintained by the courts, this interstate rail traffic is entirely outside of any governmental regulating power.

The order of the commission in this case is based upon conclusions reached after a full hearing. There is no allegation in the bill showing that there has been any irregularity in the proceedings. The commission has acted entirely within the statute and within its powers. A consideration of the report will show that all of the matters alleged in the bill were duly considered and weighed by the commission in reaching its conclusion. The nature of the traffic, the extent of the interstate transportation, the facilities and instrumentalities used by the complainant, Omaha & Council Bluffs Street Railway Company, the cost and expense of doing the business, and the comparison of this traffic with other like traffic be-

tween other cities located upon rivers where the connection is by bridge and trolley lines, and the commutation tickets upon which most of the passengers are carried were all considered by the commission as questions of fact, and its conclusions thereon are clearly stated in its report.

The order of the commission extends to all passengers the same rates now extended by the company through its commutation tickets of 5 cents to and from the loop with the Omaha fare of 5 cents added.

This order rests upon sound equity. The people of Omaha, from any point within the city, are given through transportation to any point in Council Bluffs for a fare of 10 cents, and the interstate passenger from any point in Council Bluffs to any point in Omaha is charged a like fare. The establishment of a through route and a single fare from any point in one city to any point in the other, in either direction, is based upon the broadest equities and secures to all interstate passengers uniform treatment and a uniform rate.

Respectfully submitted.

CHARLES W. NEEDHAM,
Solicitor for the Interstate Commerce Commission.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

OMAHA & COUNCIL BLUFFS STREET RAILway Company and Omaha and Council Bluffs Railway and Bridge Company, appellants,
v.
INTERSTATE COMMERCE COMMISSION AND The United States, appellees.

No. 846.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

The question is whether the Interstate Commerce act applied to the appellants.

The appellant "Omaha & Council Bluffs Street Railway Company" is an interurban electric railway, operating 136 miles of track (tr., pp. 24 and 42) and carrying passengers and United States mail (p. 24) from Omaha and certain adjacent towns, villages, and resorts in Nebraska to Council Bluffs and Courtland Beach in Iowa (tr., p. 5). The line crosses the bridge over the Missouri River between the States of Nebraska and Iowa (p. 24).

The rails are not all laid on public highways, but run for some distance over private right-of-way, and at other points run over expensive culverts not conforming to the level of streets or roads (p. 24).

The appellants claim that the act to regulate commerce does not draw this railway into its field by the following clause (sec. 1):

> That the provisions of this act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment).

The Government claims that even if it were conceded (which it is not) that this clause omits really local, municipal street car lines merely incidentally crossing State boundaries, it still does not omit these interurban, insterstate railroad systems.

FIRST POINT.

The purpose of the act indicates no reason for distinguishing these particular interstate railroads from other interstate railroads.

The purpose of the act is to regulate interstate commerce.

Of course, this purpose may well have stopped short of regulating the unsubstantial and minute portion of interstate commerce represented by the old horse-car lines within municipal settlements. Such lines had never more than a trifling and purely accidental relation to interstate commerce, so far out of proportion to their local character as to make

it perhaps not worth while for Congress to interfere with them.

The road in question, however, is not at all of this sort. It is a railroad system 136 miles in length, running through open country and, in portions of its line, over private right of way. It carries not only passengers, but the United States mail. It taps not only Omaha in Nebraska, but surrounding towns in that State, and connects them with Council Bluffs and other points in the State of Iowa.

Its bearing on interstate commerce is substantial and definite, and if it is not under regulation by the act of Congress it is under no valid control, in so far as concerns its function as interstate carrier. (*Wabash, &c., R. Co.* v. *Ill.*, 118 U. S., 557; *Covington Bridge Co.* v. *Kentucky*, 154 U. S., 204; *Hall* v. *De Cuir*, 95 U. S., 485.)

True, it is a species of railroad which was unknown at the time the act was passed, for then only two varieties of rail road existed—the steam trunk line and the city horse cars. Little by little, through the development of electric science, these two originally distinct kinds of carriers have grown toward each other, until now steam lines, on the one hand, have large portions of electric and trolley service, and the old horse-car lines, on the other, have, by means of the new power, broken through city limits and are engaged in long-distance service. Starting from opposite points, the two kinds of railroads have now met in a middle type known as the

"interurban railroads." In this class of transportation they are rivals and competitors in interstate commerce. Are these interurban railroads within the act when they happen to be operated by the old steam companies, and yet outside it when they happen to be operated by the old horse-car companies?

If the appellant company had been originally an old-fashioned steam railroad, which had embarked into electric interurban service, we assume that no question would be made; nor if, like the New York Central, the New Haven, and the Pennsylvania, entering New York City, it had changed over into electric equipment and power. Can it be decisive that in this case the development has come from the old-fashioned horse car, even though the resultant form of traffic be the same?

The policy of the act does not depend upon the prior history or the individual peculiarity of the corporation which does the operating; it depends upon the scope and nature of the operation itself and its relation to interstate commerce, and for all the purposes of the act in regard to passenger traffic in interstate commerce there is no distinction perceptible to us between these interurban railways and the old railroad lines which now use, and are more and more coming to use, electric power.

This development is only in its infancy, yet already we find systems owning or controlling hundreds of miles of interurban lines. Thus from

Moody's Manual of Railroads for 1911 we may learn that the Boston & Northern Street Railway covers 888 miles; the Interborough Metropolitan and associated companies, 875 miles; the Boston Elevated, 232 miles; the Illinois Traction Company, 445 miles; the Denver City Tramway Company, 200 miles; the Buffalo & Lake Erie Traction Company, 195 miles. From the Electric Railway Journal, Jan. 6, 1912, we find that the Michigan United operates 300 miles and the Spokane & Inland Empire Railroad 208 miles; and that the Detroit United and Lake Shore Electric lines have just inaugurated a through run from Detroit to Cleveland, the 179 miles being covered in six hours twenty-five minutes. From the same source we learn also that groups of interurban lines are forming traffic associations, corresponding to the passenger traffic associations of the steam railroads, for the purpose of promoting the "through" or "interline" business of their members. Thus the Central Electric Railway Association extends over Ohio, Indiana, Michigan, Illinois, and parts of Kentucky, having about forty member companies, representing a total of 3,672 miles of interurban railways. The report of the association (Electric Railway Journal, Jan. 6, 1912, p. 13) says:

> To-day it is no unusual circumstance for a passenger to travel from Kentucky to the eastern and northern parts of Ohio or to

> Michigan over traction lines, many of the runs covering a distance of from 150 to 200 miles of through limited cars. * * * and in many instances the limited cars attain a speed of from 60 miles per hour to 65 miles per hour over portions of their run. One of the member companies is to-day operating specially constructed modern sleeping cars with every convenience equal to the latest Pullman.

Such new developments in railroad methods automatically fall within general terms of remedial statutes, such as the Interstate Commerce Act, when they fall within the *policy* of the enactment, and the mischiefs aimed at. Our legislation is not construed to be so rigid that it can not be applied to changing conditions. (*Weems* v. *United States,* 217 U. S., 349, p. 373; *De Lima* v. *Bidwell,* 182 U. S., 1, p. 197; cf. *Bishop* v. *North,* 11 Mees. & W., 418.)

SECOND POINT.

Neither the language nor the context indicates any intention to exclude from the operation of the act interurban electric railways engaged in interstate commerce.

The language is:

> Any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water * * *).

The words "any common carrier engaged in transportation by railroad" are broad enough. They seem to reach every carrier which transports on rails, irrespective of any peculiarity in the identity of the company which operates. They are more general even than would have been the words "any railroad," which is the language assumed as the basis of the appellants' argument.

Nowhere in the act is there any express exclusion of the interurban electric railroads from the scope of this inclusive language. The appellants have argued that the use of the word "railroad" is itself sufficient to accomplish this result; that "railroad" can mean only a commercial steam railroad. This would be an extremely narrow interpretation, and one which, as we have seen, would seriously injure the effectiveness of the statute within its normal field.

These interurban railroads have been a great many times classified within statutes dealing with "railroads," as distinguished from "street railways."

Both Iowa and Nebraska recognize the fact that the interurban railroads are to be classified with the ordinary railroads rather than with the local street-car lines.

In Iowa the discrimination is made by the code, section 2033, a and b, as follows:

> *Any railway* operated upon the streets of a city or town by electric or other power

than steam which *extends beyond the corporated limits* of such city or town to another city, town, or village, or any railway operated by electric or other power than steam, extending from one city, town, or village to another city, town, or village shall be known as *interurban* railway.

The words *railway,* * * * *railroad,* * * * etc., as used in the code and acts of the general assembly, now in force or hereafter enacted, are hereby declared to apply to and *include all interurban railways.* * * *

In *Cedar Rapids, etc., M. C. Ry. Co.* v. *Cummins* (101 N. W., 176), (Iowa) the Supreme Court of the State of Iowa held, under these sections, that the electric interurban railway from Cedar Rapids to Marion in Iowa was subject to the same tax laws as ordinary railroads, though if it had run only within the corporate limits of a city it would be under different regulations.

In Nebraska, likewise, the class of so called " interurban railroads " is recognized by statute and given the powers of eminent domain.

* * * shall have the right to construct and operate *interurban railroads,* using motive power other than steam, and in the construction and operation of said interurban railroads shall have all the powers of eminent domain contained in said chapter. Cobbey's Annotated Statutes of Nebraska, 1909, sec. 10517.)

Indeed, with the growth of this branch of railroad traffic into major dimensions and importance, its distinction from the mere local street railways and its identity with the old school railroads have been generally recognized.

Elliott on Railroads (2nd ed., Ch. XLIV) devotes an entire chapter to the discussion of interurban railroads, as a third class, wholly distinct from either street or commercial railroads. In sec. 1096ba he quotes and substantially adopts the definition from the Iowa Code, supra, and in sec. 1096bb, he further says:

> As already stated, interurban railroads frequently have their own rights of way in the country, often carry freight of some kinds at least, and may, and do sometimes, operate substantially as a through railroad from one city to another, miles away (citing *Mallott* v. *Collinsville, etc., R. Co.* 108 Fed., 313, 318). Indeed, the day seems not far distant when one may go, by such roads, almost across the continent. The better and faster cars are devoted more and more to through travel from one large city to another, rather than to the accommodation of local traffic between or in the smaller places.

City of Philadelphia v. *Philadelphia Traction Co.*, 55 Atl., 762 (Penn):

> Railroad and railway are synonymous. Either includes street railway, unless something in the act, title, purpose, or context prevents it.

Cincinnati, etc., Electric R. R. Co. v. *Lohe,* 68 Ohio, St. 101.

Held that an interurban electric railroad, though not classed with steam railroads ordinarily under Ohio statutes, was nevertheless a "railroad" within the meaning of statutes to prevent the negligent running of cars, though street-car lines would not have been.

Malott v. *C. & E. St. L. Electric R. Co.,* 108 Fed., 313:

Statute giving commission power to prescribe place and manner of crossing tracks of another railroad.

Riggs v. *St. Francois Co. Ry. Co.,* 120 Mo. Supp., 335:

Statutes requiring fencing of right of way.

Montgomery St. Ry. Co. v. *Lewis,* 148 Ala., 134:

Regulations as to care in operating.

Katzenberger v. *Lawo,* 90 Tenn., 238:

Railway in city streets, exclusively engaged in carrying passengers, held "railroad" within statute requiring lookout on locomotive and whistle to be sounded.

Hestonville, etc., R. R. v. *Phila.,* 89 Pa. St., 210.

Statutes authorizing consolidation of railroads, includes street railroads.

In re Washington Street Ry. Co., 115 N. Y., 442.

Statutes authorizing consolidation.

Central National Bank v. *Worcester H. R. Co.*, 13 Allen, 105.

Statute that any corporation "except railroad and banking corporations" could institute insolvency proceedings.

Egan v. *Cheshire St. Ry. Co.*, 78 Conn., 291.

Statutory lien in favor of anyone rendering services in construction of a railroad.

Savannah, etc., R. Co. v. *Williams*, 117 Ga., 414.

Statute abolishing fellow-servant rule.

Rafferty v. *Central Traction Co.*, 147 Pa. St., 579.

Statute giving right to lease lines.

Bloxham v. *Consumer's, etc., Co.*, 36 Fla., 519.

Purposes of taxation.

City of Chicago v. *Evans*, 24 Ill., 52, 55.

Horse railroads included in statute permitting lease of lines.

Citizens R. Co. v. *Pittsburg*, 104 Pa. St., 522.

Act taxing railroads held to include street railroads.

Bloxham v. *Consumer's E. Co. and St. Ry.*, 36 Fla., 519.

Tax statute.

Clinton v. *Iowa*, 37 Iowa, 61.

Right of way statute (horse railroad).

Lieberman v. *R. R.*, 141 Ill., 140.

Eminent domain statute (elevated road).

Baldwin, Am. Railroad Law, 9.

Birmingham R. Co. v. *Jacobs*, 92 Ala., 187:

> A railroad * * * running beyond the corporate limits of any city or town and through counties, is not and necessarily cannot be a street railway * * *.

Diebold v. *Kentucky Traction Co.*, 24 Ky. L. R., 1275:

> The term "street railway" as used in sec. 163 of the State constitution, means, and can only mean, applying to it a common sense interpretation, those street railroads which, before the introduction of electricity, used mules and horses as motor power for drawing the street cars over its street car tracks, for the use and convenience of the local public *in a municipality*. Those street cars that run along the streets of a city, picking up passengers here and there, and putting them off at street crossings and at the termini of the street car companies' tracks within the municipality. They were created and organized and operated, and such was their character as defined in their charter, strictly and exclusively for the local convenience of those persons or passengers whose pleasure or business prompted them to go from point to point within the city. They were never intended for commercial purposes between different cities within a State, or between different cities in different States.

The significance attached to particular terms by special local statutes, or by local usage, can not con-

trol the construction of an act of Congress. If it did so Federal statutes would mean one thing in one State and one thing in another.

A similar situation arose in *Liverpool Insurance Co.* v. *Mass.* (10 Wall., 566), in which an association was held to be "a corporation" within the meaning of the Massachusetts corporation-tax law, although the law of England, under which it was organized, expressly provided that it should *not* be "a corporation."

Nor is there any merit in the argument that these appellants should not be classified with railroads, because they were incorporated, not under the railroad incorporation law, but under the street railway incorporation law of Nebraska. The point to be considered is not what they are legally empowered to do, but what they are in fact doing.

Whether the Nebraska corporation is acting ultra vires in operating an interurban railroad is immaterial. This point was unanswerably covered by the opinion of the Commerce Court. Judge Mack says:

> Whether or not the street railway company is empowered as a Nebraska corporation to operate the bridge and the Iowa lines is immaterial in this case. It is, rightly or wrongly, engaged in their operation, and it is, therefore, a common carrier engaged in the interstate transportation of passengers by electric railway.

> It is likewise immaterial to this inquiry that the street railway company is created under the street railway and not under the commercial railroad act of Nebraska. If, soundly interpreted, the Federal act gives the commission jurisdiction over such electric railways, State legislation is powerless to limit or to prevent such grant. (Tr., p. 42.)

Of course, the mere use of electric power, rather than steam, does not by itself determine the question whether a carrier is a "railroad."

Malott v. *C. & E. St. & Electric Ry. Co.*, 108 Fed., 313.

Diebold v. *Ky. Traction Co.*, 25 Ky. L. Rep., 1275 (77 S. W., 674).

Riggs v. *St. Francois County Ry.*, 120 Mo. App., 335.

Stillwater v. *St. R. Co.* v. *Boston, etc., R. Co.*, 171 N. Y., 589.

> An electric railroad carrying both passengers and freight was allowed to compel a steam railroad to give it track connections under a statute giving that right to "every railroad corporation."

McDonald v. *Union Freight R. Co.*, 190 Mass., 123.

> Tax on earnings of street railways. Statutes defined street railways as those using some motive power other than steam. But a steam railroad whose charter gave it all the

privileges of street railroads had to pay the tax.

Nor is the purpose of the act limited to the protection of freight alone. The carrying of passengers is equally within its scope. This is explicit enough from the following points appearing on the face of the act:

> The constant use in the disjunctive of the words "transportation of passengers *or* property"; as in "this act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers *or* property."
>
> The prohibition of free passes. (Sec. 1.)
>
> The requirement of posting of "rates and fares" (sec. 6) as a prerequisite to engaging in the transportation of "passengers *or* property."
>
> The power given the commission to prescribe charges for the transportation of "persons *or* property" (sec. 15) and to suspend new schedules of "*fares.*"
>
> Reports to contain information concerning "fares *or* freights." (Sec. 20.)
>
> Allowance of mileage, excursion, and commutation tickets, together with reduced rates to certain classes of persons. (Sec. 22.)

Finally, it is to be observed that nothing in the context indicates any intention to exclude this

species of railroads. It is urged that many of the requirements of the act could not possibly apply to this sort of railroad but the same thing is true as to the old-style railroads themselves, and the sleeping-car companies, and the pipe lines, and the telegraph and telephone companies. Of course, not every provision of a statute is applicable to every portion of its field.

Without insisting, therefore, upon the all-inclusive definition, it is sufficient for present purposes to recognize the fact that these interurban lines constitute a species of rail traffic wholly distinct from the ordinary street railway. It is submitted that for the purposes of this act the interurban lines should be classified not with the street railways, but with the steam lines which they approximate in function.

THIRD POINT.

The administrative construction by the commission has been long acquiesced in and finally ratified by Congress.

The Interstate Commerce Commission has consistently assumed jurisdiction over this class of railroads. They file their schedules of rates just as the steam roads do. At the present moment the commission has in its public records between 3,000 and 4,000 electric-railway tariffs.

The commission has made repeated formal decisions upon the subject, as in *Willson* v. *Rock Creek Ry.*, 7 I. C. C., 83 (decided in 1897); *C. & M. Electric R. R. Co.* v. *I. C. R. R. Co.*, 13 I. C. C., 20; *Beall* v. *W., A. & Mt. V. Ry.*, 20 I. C. C., 406; *C. & C. Traction Co.* v. *B. & O. S. W. R. R. Co.*, 20 I. C. C., 486. Since the decision by the commission of the Rock Creek case (involving a line entering the District of Columbia) Congress has repeatedly amended the act, but it has never disturbed that decision.

Furthermore, by the last amendment, made in 1910, it assumed that the general jurisdiction existed, and put a limitation upon it, as follows:

> The commission shall not, however, establish any through route, classification, or rate between *street electric passenger railways* not engaged in transporting freight in addition to their passenger and express business *and railroads of a different character.*

This limitation of the power was inserted without any coincident insertion of a grant of the general power, and that general power was left to rest solely on the generic meaning of the word "railroad" where, as we contend, it always had been.

If Congress had supposed that the words "carrier by railroad" did not include this sort of carrier, this amendment would have been mere silliness, being a limitation of a power which would have had no existence at all; and if Congress had not concurred in the commission's entire assump-

tion of jurisdiction it certainly would not have eliminated a mere small part of it.

FOURTH POINT.

Even if the commission's order was without lawful authority at the time it was made, the amendment of 1910 either ratified it altogether or at least validated it for the future.

Assuming, for the purpose of argument, that the amendment of section 15 by the act of June 18, 1910, was not declaratory of the jurisdiction of the commission over the electric railroads, it must, at least, have created such a jurisdiction by implication from the limitation it expressly made upon it.

At the time of the amendment the commission's order had been some four months in operation. For even that passed time it was ratified by the amendment, within the decisions of the court.

In *Hamilton* v. *Dillon* (21 Wallace, 73, 88, 95) it appeared that during the Civil War the Secretary of the Treasury had exacted four cents a pound for permission to trade in cotton over the Confederate line. On a suit to recover back the money as unlawfully exacted, it was held that even if the act had been beyond the authority of the executive, it had been ratified by a later act of Congress and this even though the statute did not in terms specify ratification.

The same principle was held in *Mattingly* v. *Dist. of Col.* (97 U. S., 687, 690):

> The board of public works had made *ultra vires* improvements, and to pay for

> them had levied a special assessment upon the plaintiff. Later an act by Congress gave the board power to carry on works of the sort in question. The court held that the plaintiff could not recover back the assessment. It had been ratified by the grant of the power. Here again the statute did not expressly state the ratification.

See also *Nat. Bank* v. *Shoemaker* (97 U. S., 692); *U. S.* v. *Heinszen* (206 U. S., 370).

At best, however, from the time the power was given (which on this theory would have been June 10, 1910) the order was valid, and therefore it should not be set aside.

B. & O. R. R. Co. v. *I. C. C.* (221 U. S., 612) is directly in point. That is the case in which the court considered an order of the commission made in 1908 requiring monthly reports concerning hours of service.

The B. & O. R. R. sought to have the order annulled as beyond the authority of the commission. It had been agreed that pending suit reports should not be required, so that only the future operation of the order was involved.

The court held that—

> * * * although there might have been doubt as to the adequacy of the authority of the commission, under the law as it formerly stood, to require the reports, there can be none now in view of the amendment of sec-

tion 20 of the act to regulate commerce by the act of June 18, 1910.

* * * This clearly embraces the power which the commission here asserts, and it is certainly now entitled to promulgate an order requiring reports to be made. It follows that, as under the stipulation of record here the requirement is to operate wholly in the future, and it has been suspended awaiting the final determination of this cause, the question of the authority of the commission at the time the order was made has become a moot one.

The court therefore affirmed the judgment sustaining the demurrer to the petition which attacked the order as invalid.

FIFTH POINT.

The judgment should be affirmed, or if not affirmed as rendered, should be modified to set aside the order only in its operation prior to June 18, 1910.

February, 1912.

WINFRED T. DENISON,
Assistant Attorney General.

THURLOW M. GORDON,
Special Assistant to the Attorney General.

○